

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

JANUARY TERM, 1935

No. 6406

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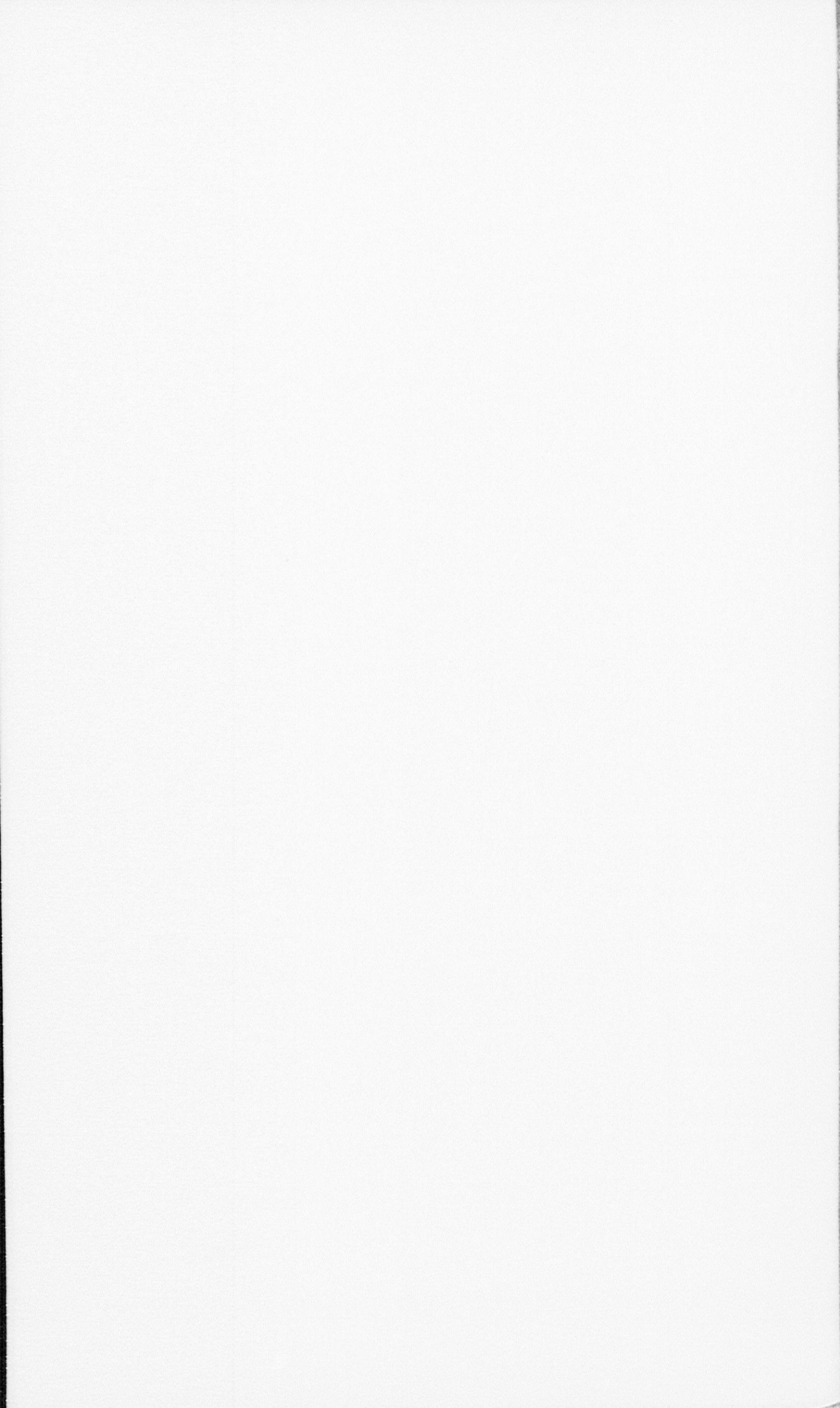
HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT
OF THE INTERIOR OF THE UNITED STATES, AP-
PELLANT

vs.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE OF
AMOS HAMILTON, DECEASED, AND MARIE HAMIL-
TON

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 4, 1935



UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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APPELLANT

vs.

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AMOS HAMILTON, DECEASED, AND MARIE HAMIL-
TON, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

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SUPREME COURT OF THE DISTRICT OF COLUMBIA

At Law No. 84367

UNITED STATES OF AMERICA, EX REL. AMOS HAMILTON AND MARIE
Hamilton, plaintiffs

vs.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR
of the United States, defendant

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of
Columbia, at the city of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and pro-
ceedings had in the above-entitled cause, to wit:

1

Petition for writ of mandamus

Filed August 6, 1934

In the Supreme Court of the District of Columbia

At Law, No. 84367

UNITED STATES OF AMERICA EX REL. AMOS HAMILTON AND MARIE
Hamilton, plaintiffs

vs.

HAROLD L. ICKES, SECRETARY OF THE DEPARTMENT OF THE INTERIOR
of the United States, defendant

Come now petitioners, Amos Hamilton and Marie Hamilton, and
respectfully show unto Your Honor:

1. That petitioner, Amos Hamilton, is a full-blood Indian, duly
and lawfully enrolled as a member of the Osage Tribe of Indians in
Oklahoma on the final roll of said tribe confirmed by act of Congress
approved June 28, 1906 (34 Stats. at L. 539-40); that petitioner,
Marie Hamilton, is a full-blood Indian, duly and lawfully enrolled
as a member of the Pueblo Tribe of Indians of New Mexico; that
both petitioners are citizens of the United States and of the State of
Oklahoma, and reside on the Osage Reservation near the village of
Hominy in said State.

2. Defendant, Harold L. Ickes, is a citizen of the United States,
resident of the State of Illinois, commorant of the District of Co-
lumbia, holding the office of Secretary of the Department of the
Interior of the United States, and is sued herein in his official
capacity.

3. On December 10, 1896, while attending school at Carlisle, Penn-
sylvania, petitioners were lawfully married and have, ever since
shortly after said marriage, resided on the Osage Reservation
in Oklahoma. On November 20, 1905, there was born to peti-
tioners at Claremore's camp, near Hominy, Osage Reservation,

2

a male child whom they thereafter named Timothy. On December 12, 1905, the duly authorized agents of the United States, acting in their official capacity, completed a roll of the members of the Osage Tribe of Indians, upon which said roll the name of their said son, Timothy, was duly and lawfully inscribed at page 39 opposite number 1967 as a member of said Osage Tribe of Indians, and their said son, by reason thereof, became a duly enrolled member of said tribe. Petitioners thereafter received the annuity money payment made in the month of December 1905 to which their said child was entitled by reason of said enrollment. Thereafter, and early on the morning of January 1, 1906, their said child, Timothy, died unmarried and leaving no issue.

4. The act of Congress approved June 28, 1906 (34 Stats. at L. 539) contained the following applicable provisions of law:

"That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided*, That the principal chief of the Osages shall, within three months from and after the approval of this act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable,

shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as

herein provided shall be final," * * *; "and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinbefore provided."

"SEC. 4. That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage Tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

"First. That all the funds of the Osage Tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage Tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage Tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years; *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

4 "Second. That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.

"Third. There shall be set aside from the royalties received from oil and gas not to exceed fifty thousand dollars per annum for ten years from the first day of January, nineteen hundred and seven for the support of the Osage Boarding School and for other schools on the Osage Indian Reservation conducted or to be established and conducted for the education of Osage children.

"Fourth. There shall be set aside and reserved from the royalties received from oil, gas, coal, or other mineral leases, and moneys

received from the sale of town lots, and rents from grazing lands not to exceed thirty thousand dollars per annum for agency purposes and an emergency fund for the Osage Tribe, which shall be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior.

"SEC. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

5. Petitioners further represent that said roll of December 12, 1905, was the last roll of members of the Osage Tribe of Indians made by lawful authority prior to January 1, 1906; that said roll was on file in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, on January 1, 1906, and was the basic roll referred to and described in section 1 of said act of June 28, 1906, and therein confirmed, subject only to the limited jurisdiction over any name appearing thereon conferred upon the Secretary of the Interior, said limited jurisdiction so conferred being contained in the following provision of section 1 of said act:

"That the principal chief of the Osages shall, within three months from and after the approval of this act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud," * * * "and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud."

6. Petitioners represent that no list in writing was ever filed by the principal chief of the Osages with the Secretary of the Interior within three months after June 28, 1906, which contained the name of their said son, Timothy, and charging that the said name had been placed upon said roll by fraud, and that the said Secretary never acquired any jurisdiction over the name of their said son, Timothy, appearing on said confirmed roll, nor possessed any power to strike said name from said roll or to omit said name from any roll of the Osage Tribe of Indians thereafter prepared by order of the said Secretary for either allotment of lands or the distribution of tribal moneys.

7. Petitioners further represent that by reason of the enrollment of the name of their said son, Timothy, on said final roll of the Osage Tribe of Indians, and the confirmation of said roll by section 1 of said act of June 28, 1906, their said son, Timothy, or his lawful heirs, by virtue of the provisions contained in sections 2 and 4 of said act, became invested with an absolute right to an equal per capita share in all lands and moneys directed by said act to be allotted, or paid, to the members of said tribe, or their lawful heirs, or held for his, her, or their account as restricted Indian property, and that your petitioners, by reason of the death of their said son, Timothy, and by operation of section 6 of said

act, became and ever since have been invested with an absolute right to said per capita share of which their said son, Timothy, would have been entitled had he lived.

8. Petitioners further represent that they are wards of the United States, their property rights derived from membership or inheritable interests in the Osage tribal property, being now, and at all times in the past, held, managed, and controlled by the Secretary of the Interior under authority conferred upon said Secretary by acts of Congress; that long prior to the 28th day of June 1906, and at all times thereafter, the United States has maintained an agent or superintendent of, or for, the Osage Indians, said agent or superintendent being appointed by the Secretary of the Interior; that among the duties of said agent, or superintendent, at all times has been the duty of looking after, protecting, and caring for the property and property rights of the Osage Indians; that following the approval of said act of June 28, 1906, the then Acting Commissioner of Indian Affairs in writing under date of January 30, 1908, issued the following instruction to the United States Indian Agent, Osage Agency:

"In view of the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), known as the Osage Allotment Act, it is desired that you prepare in triplicate as complete a roll as possible of the Osage Tribe of Indians and forward all parts to this office for approval by the Secretary of the Interior.

"The roll should consist of (1) the names on the Osage tribal roll as it existed in your office on the first day of January 1906; and (2) of the names of all persons, including adults and children, subsequently added thereto by direction of this office with the authority of the Secretary of the Interior, in accordance with the provisions of section 1 of the act named.

"The column for remarks in the roll should show the date and file number of the authority for each name added to the roll 'as it existed on the first day of January, nineteen hundred and six.'

"You should properly certify to the correctness of the roll."

7 Petitioners represent that the agent, in carrying out the first instruction contained in said letter, adopted and used the said roll of December 12, 1905, as the roll of the Osage Tribe of Indians on file in his office on the 1st day of January 1906.

9. Petitioners further represent that the then agent of the Osage Indians, acting under the authority contained in the instructions set out in the preceding paragraph, prepared a roll in triplicate which he certified to the Secretary as a true and correct roll of the members of the Osage Tribe of Indians; that in the preparation of said roll the said agent ignored or disregarded the name of petitioners, said son, Timothy, on said basic roll confirmed by said act of Congress, and omitted to enscribe said name on the said roll so prepared and certified to by him; that prior to the completion of said roll by said agent no investigation was made of which petitioners, or either of them, received any notice, into the time, or date, of the death of their deceased son, Timothy, nor did said agent advise your petitioners, or either of them, that said new roll was in course of preparation, or that it was necessary for them to do or perform

any act or thing in order to protect their rights in and to their distributive or inheritable shares of the Osage property; that said roll so prepared, without any notice to your petitioners, from which was omitted the name of their deceased son, Timothy, was transmitted to the Secretary of the Interior and by him approved on April 11, 1908, no mention being made of the omission therefrom of the name of petitioners, said son, Timothy, therefrom or the reason therefor.

10. Your petitioners further represent that the name of their said son, Timothy, was on said roll of December 12, 1905, confirmed by act of Congress, and that the Secretary of the Interior never acquired any jurisdiction over said name on said confirmed roll, and possessed no power to either strike said name from said confirmed roll, nor to omit said name from any subsequent roll prepared by said Secretary of the members of the Osage Tribe of Indians; that the only jurisdiction conferred by said act of June 28, 1906, upon the Secretary of the Interior was over names to be added to said confirmed roll, and over names appearing on said confirmed roll as set out in paragraphs 5 and 6 of this petition.

11. Petitioners further represent that they have been denied the per capita share to which they are now and have at all times been lawfully entitled in all annuity and other payments made the Osage Indians since the death of said their son, Timothy, on January 1, 1906; that they were first denied said share when the quarterly annuity payment was made the Osage Indians in March 1906 on the ground, as stated by the agent then in charge, that their said son, Timothy, was dead, and that his death by law terminated any further rights in and to the tribal property flowing from his enrollment; that placing reliance in said statement by said agent they made no protest believing the same to be true; that a number of years later they learned that other parents were receiving per capita shares in tribal annuity and other payments as the heirs of their deceased children, and thereupon petitioners went to the agent in charge and requested an explanation of their failure to receive the share to which they were entitled as the lawful heirs of their deceased son, Timothy; that said agent then in charge informed them that the name of their son, Timothy, was not on the final roll approved by the Secretary of the Interior, having been omitted therefrom for the reason that he was dead at the time said roll was made, that the said roll approved April 11, 1908, was the final roll of the Osage Indians and that nothing could be done for them; that it was not until late in the summer of 1932 that they first learned through Thomas L. Sloan, an attorney, that the reason for the refusal of said agent, or superintendent, to pay petitioners the per capita share to which they were entitled as the lawful heirs of their deceased son, Timothy, was that it was claimed that their said son died prior to January 1, 1906, and that his demise prior to said date operated in law to remove his said name from said confirmed roll.

12. Petitioners further represent that shortly thereafter they applied to the Secretary of the Interior, by proper petition, for the payment to petitioners of a per capita share in all future annuity

and other payments to be made, and for the payment to them of an amount equal to said per capita share in all annuity and other payments made since December 1905, to the members of the Osage Tribe of Indians, as the lawful heirs of their deceased son, Timothy, to which they were entitled by reason of the enrollment of the name of their said son, Timothy, on said final roll and as his lawful heirs; that by decision dated September 15, 1933, the Secretary of the Interior denied said petition upon the stated ground that by the said Act of June 28, 1906, the Secretary of the Interior was given complete jurisdiction over the preparation of the final roll of the Osage Tribe of Indians and all names to be included thereon; that under said authority the Secretary of the Interior caused a roll of the members of the Osage Tribe of Indians to be prepared and on April 11, 1908, the said Secretary approved said roll which, under said act, became, and ever since has been, final.

10 13. Petitioners further represent that thereafter they filed with the Secretary of the Interior a further petition for the recognition by the said Secretary of the identical right claimed in the petition first filed by them, and denying that by the said act of June 28, 1906, the Secretary of the Interior was given jurisdiction over the name of their deceased son, Timothy, appearing on said confirmed roll, and denying that the roll prepared under the direction of the Secretary of the Interior and approved by him on April 11, 1908, in anywise impaired the enrollment of the name of their said deceased son, Timothy, on the final basic roll of the Osage Tribe of Indians confirmed by said act of Congress, or in anywise impaired their rights, as the lawful heirs of their said deceased son, to said distributive share; that thereafter and by decision dated May 18, 1934, the Secretary abandoned the basic ground for the denial of their petition first filed as set out in said decision of September 15, 1933, but again denied the relief sought in said second petition on the stated ground that the records of the said Osage Indian Agency on file on the 1st day of January 1906 disclosed that their son, Timothy, died prior to January 1, 1906, and that his death prior thereto automatically in law removed the name of their said son, Timothy, from the roll confirmed by said act of Congress. Petitioners represent that there was no record kept or maintained in said United States Indian Agency prior to January 1, 1906, pursuant to any law of Congress or any departmental regulations that contained any official entry of the death of their said son, Timothy, prior to January 1, 1906, and that on January 1, 1906, there was no record on file at said agency containing such an entry.

11 14. Petitioners further represent that their said son, Timothy, did in fact die on January 1, 1906; that the jurisdiction of the Secretary of the Interior over the name of their deceased son, Timothy, appearing on said basic roll, confirmed by said act of Congress was dependent solely upon authority contained in said act of June 28, 1906, and that said act conferred no jurisdiction upon the Secretary of the Interior over said name, or to make any inquiry as to whether their said son, Timothy, whose name ap-

peared upon said confirmed roll, was alive or dead on the 1st day of January 1906, but made said enrollment absolute, so far as the Secretary of the Interior was concerned. And petitioners further say that if the continuance of the name of their said son, Timothy, on the final roll of the Osage Tribe of Indians was dependent upon their said child being alive on or after the 1st day of January 1906 (which they deny) it became the duty of the Secretary of the Interior to, by proper investigation, with notice thereof to petitioners and an opportunity to them to be heard in their own right, to determine the date upon which their son did in fact die; that no investigation of any kind or character, so far as petitioners are advised, was ever made by any agent of the Secretary of the Interior into the time of the death of their deceased son, Timothy, nor was any finding ever made and approved by the Secretary of the Interior as to the date of his said death, nor was the date of his said death shown by any record on file in said agency on January 1, 1906. And petitioners say that the action of the Secretary of the Interior, as aforesaid, was without authority of law, was arbitrary, and capricious and a denial to petitioners of their lawful rights. Petitioners further say that unless required to do so by proper order of this Court the said Secretary of the Interior will continue to deny petitioners their said lawful rights resulting in irreparable injury to them.

Wherefore, plaintiffs pray:

1. That a rule issue directed to Harold L. Ickes, Secretary of the Interior, requiring him to show cause, on a day certain to be
12 therein named, if any he may have, why a writ of mandamus should not issue commanding him (a) to recognize the name of petitioner's son, Timothy Hamilton, on the final roll of the Osage Tribe of Indians, and to pay to petitioners as the lawful heirs of their said deceased son, the share in all future payments made the Osage Indians to which their said son would have been entitled if alive; and (b) to pay to petitioners an amount equal to a per capita share of all annuity and other payments made to the members of the Osage Tribe of Indians since the quarterly annuity payment of December 12, 1905, or in lieu of payment to them, to place said amount to their credit out of any funds standing to the credit of the Osage Tribe of Indians applicable for such purposes, to be held and expended for their benefit as other restricted Indian moneys.

2. Plaintiffs also pray for such other and further relief in the premises as to the court may seem just and proper.

AMOS HAMILTON,
MARIE HAMILTON,
Petitioners.

WEBSTER BALLINGER,
THOMAS L. SLOAN,
Attorneys for Petitioners.

STATE OF OKLAHOMA,
County of Osage, ss:

Amos Hamilton and Marie Hamilton being by me first duly sworn, according to law, upon oath deposed and said that they had read the above and foregoing petition by them subscribed and knew the contents thereof; that the matters and things therein stated upon

their personal knowledge are true and those matters and things stated upon information and belief, they believe to be true.

AMOS HAMILTON,
MARIE HAMILTON.

Subscribed and sworn to before me this 14 day of July 1934.

[SEAL]

BEATRICE PEEK,

Notary Public, County of Osage, State of Oklahoma.

My commission expires Nov. 19, 1934.

140

Rule to show cause

Filed August 6, 1934

* * * * *

Upon consideration of the petition of Amos Hamilton and Marie Hamilton filed herein on the sixth day of August 1934, it is by the court this sixth day of August 1934, ordered:

That respondent, Harold L. Ickes, Secretary of the Interior of the United States of America, show cause, if any he may have at the incoming of court Monday, September 10, 1934, at the hour of 10:00 a. m., why a writ of mandamus should not be issued as prayed in said petition; Provided that a copy of this order be served upon the respondent on or before the first day of September 1934.

By the court:

JAMES M. PROCTER,
Justice.

MARSHAL'S RETURN

Served a copy of the above rule on the above-named Harold L. Ickes, Secretary of the Interior, by serving Harry Slattery, Assistant Secretary, Aug. 7, 1934, personally. John B. Colpoys, U. S. marshal in and for the Dist. of Columbia. By Maurice F. Senis, deputy U. S. marshal. K.

Motion of plaintiffs to amend petition

Filed September 10, 1934

* * * * *

Come now the plaintiffs in the above-entitled cause, by their attorneys, Webster Ballinger and Thomas L. Sloan, and move the court for leave to make the following amendments to the petition heretofore filed herein:

1. On page 11 at the end of the first prayer, insert an additional prayer numbered 2 as follows:

141 That upon final hearing the writ of mandamus issue directed to the defendant, Harold L. Ickes, Secretary of the Interior, commanding him to, (a) recognize the name of petitioners' son, Timothy Hamilton, as now, and at all times heretofore on the final roll of the Osage Tribe of Indians, and to pay to petitioners as the lawful heirs of their deceased son, the share in all future payments made the Osage Indians to which their said son would have been entitled if alive; and, (b), to pay to petitioners out of appli-

cable funds of the Osage Tribe of Indians now in hand, or that may hereafter be received, an amount equal to a per capita share of all annuity and other payments made the members of the Osage Tribe of Indians since the quarterly annuity payment of December 12, 1905, or, in lieu of payment to them, to place said amount to their credit to be held and expended for their benefit as other restricted Indian moneys.

2. Change prayer numbered 2 to prayer numbered 3.

WEBSTER BALLINGER,
THOMAS L. SLOAN,
Attorneys for Plaintiffs.

Motion granted, and plaintiffs' petition stands amended in the respects above set out.

JENNINGS BAILEY,
Justice.

I consent:

WILLIAM H. HASTIE,
*Assistant Solicitor,
Dept. of the Interior.*

142 *Return to rule to show cause and answer to petition for writ of mandamus*

Filed September 14, 1934

Comes now the defendant Harold L. Ickes, Secretary of the Interior, making his return and answer in the above-entitled case, and for cause why writ of mandamus should not be issued in the cause respectfully shows as follows:

Answering the plaintiffs' petition generally and showing cause why as a matter of law writ of mandamus should not issue, the defendant shows

That the final roll of the members of the Osage Tribe of Indians in Oklahoma prepared pursuant to the provisions of the act of June 28, 1906, duly authenticated and certified photostatic copy of which roll, marked "Exhibit A", is attached hereto and prayed to be read as part hereof as if set out fully herein, contains and exhibits at the end thereof the approval of the Secretary of the Interior in the following language:

143

"DEPARTMENT OF THE INTERIOR,
"Washington, April 11, 1908.

"The foregoing certified roll of members of the Osage Tribe of Indians in Oklahoma, prepared in accordance with the provisions of the act of Congress of June 28, 1906 (34 Stat. L., 539), embracing the names of 2,230 persons as shown on the foregoing pages numbered 1 to 93 inclusive, is hereby approved.

"JAMES RUDOLPH GARFIELD,
"Secretary."

that, as is admitted by the plaintiffs in their petition, the name of Timothy Hamilton does not appear upon the aforesaid roll; that by express provision of the act of June 28, 1906, the aforesaid approved

roll is made final and conclusive of the membership of the Osage Tribe of Indians; that the act of June 28, 1906, expressly denies to Indians excluded from the benefits of enrollment under said act any right of appeal to any court for relief in the premises; that it is the purpose and prayer of the plaintiffs' present petition that the defendant be required to recognize the name of Timothy Hamilton on the final roll of the Osage Tribe of Indians provided for by the said act of June 28, 1906; that by reason of the aforesaid provisions of the act of June 28, 1906, and by reason of the preparation and approval of the final roll as aforesaid this court is without jurisdiction in this cause and the relief prayed for is beyond the power of the defendant to grant.

That the plaintiffs heretofore have petitioned the defendant that he grant them the substantive relief which they now seek in this court; that pursuant to said petition the defendant has granted to the plaintiffs full opportunity to be heard and to present
144 evidence; that after full hearing and consideration of all of the evidence the defendant has found as a fact shown by the records of the United States in the office of the United States Indian agent at the Osage Agency in Oklahoma that Timothy Hamilton died prior to January 1, 1906, and has found further as a conclusion of law that the death of an enrolled Osage Indian prior to January 1, 1906, operated to remove the decedent from the tribal roll, and so has concluded and decided that the name of Timothy Hamilton was not and could not lawfully be upon the roll of the members of the Osage Tribe provided for in the act of June 28, 1906; that the aforesaid findings and conclusions of the defendant appear in two formal opinions, dated September 15, 1933, and May 18, 1934, copies of which marked "Exhibit B" and "Exhibit C", respectively, are attached hereto and prayed to be read as part hereof as though fully set out herein; that decision in the premises was not made arbitrarily but required and was reached by the exercise of discretion and judgment in the interpretation of a statute and in the determination of questions of fact; that such decision may not be controlled or reversed by writ of mandamus.

Wherefore, the defendant says that the plaintiffs have no right to the writ of mandamus because this court is without jurisdiction in the premises, because the relief prayed for is beyond the power of defendant to grant and because the matter herein involved is not the performance of a ministerial duty controllable by writ of mandamus.

145 And further and more particularly answering each paragraph of the petition of the plaintiffs for writ of mandamus, the defendant shows as follows:

1. The defendant denies that any document existing June 28, 1906, was confirmed by the act of June 28, 1906, as the final roll of the members of the Osage Tribe of Indians, and says that the final roll of said tribe is the document approved by the Secretary of the Interior April 11, 1908, hereinbefore referred to and incorporated as exhibit A. The defendant admits the other allegations of paragraph 1 of the plaintiffs' petition.

2. The defendant holds office as Secretary of the Interior, and not as Secretary of the Department of Interior as alleged in paragraph 2 of the plaintiffs' petition.

3. The defendant admits that the plaintiffs are legally married and for a long time have resided on the Osage Reservation in Oklahoma, but the defendant denies that on November 20, 1905, a male child, thereafter named Timothy, was born to the plaintiffs, and says that the said child was born on October 20, 1905, as appears upon certain records of the Osage Indian Agency of the United States, namely, the Record of Births among Indians of the Osage Agency, the Proceedings of the Osage Council or Business Committee at a meeting held in Pawhuska, Oklahoma, on December 4, 1905, and the Annuity Pay Roll of the Members of the Osage Tribe for the month of December 1905, at page 39 thereof, duly certified and authenticated photostatic copies of which, marked "Exhibit D", "Exhibit E", and "Exhibit F", respectively, are attached hereto and prayed to be read as part hereof as if set out fully herein.

146 The record referred to by the plaintiffs upon which the name of Timothy Hamilton is inscribed is the aforesaid annuity pay roll for the month of December 1905. The defendant denies that Timothy Hamilton died January 1, 1906. The records of the Osage Indian Agency of the United States show, and the defendant therefore believes and avers that the said Timothy Hamilton died during the month of November 1905. The aforesaid records are those records hereinbefore mentioned and incorporated as exhibit D, exhibit E, and exhibit F, and also the Record of Deaths among Indians of the Osage Agency, at the page thereof numbered 208, and the Annuity Pay Roll of the Members of the Osage Tribe of Indians for the month of March 1906, at page 9 thereof, duly certified and authenticated copies of which marked "Exhibit G" and "Exhibit H", respectively, are attached hereto and prayed to be read as part hereof as if set out fully herein. The name of Timothy Hamilton appears upon the annuity pay roll for December as one entitled to that quarterly payment by reason of the practice then established in the administration of Indian affairs that one quarterly payment be made to the head of a household on account of a deceased member thereof to cover expenses of burial.

4. The statute set out in paragraph 4 of the plaintiffs' petition is a subject of judicial notice.

5. The defendant denies that the annuity pay roll for December 1905, was confirmed by the act of June 28, 1906, or referred to and described therein except as reference is made generally to the records of the United States in the office of the United States Indian agent at the Osage Agency. The defendant further says that he construes and interprets the reference in section 1 of said act to the roll of the Osage Tribe of Indians as it existed on the first day of January, nineteen hundred and six, as meaning and designating the legal membership of the tribe as it existed on the stated day, and not as designating any particular document then in existence.

147 6. The defendant admits that no showing has ever been made that the name of Timothy Hamilton was placed on the annuity pay roll

for December 1905 by fraud, but denies that the name of Timothy Hamilton appears upon any roll confirmed by or under the act of June 28, 1906.

7. The defendant denies that Timothy Hamilton or his heirs on his account have ever acquired any right to a per capita share in any land or money under the provisions of the act of June 28, 1906.

8. The defendant denies that the preparation of a final roll as provided by the act of June 28, 1906, and as carried out by the United States Indian agent at the Osage Agency was a mere transcribing of all names which appeared upon the annuity pay roll for December 1905, and says that the roll as of January 1, 1906, contemplated and provided by law and prepared by the United States Indian agent, was the total living membership of the Osage Tribe on that date as shown by the records of the United States in the office of the United States agent at the Osage Agency, and that the aforesaid records, hereinbefore referred to and incorporated as exhibits D to H, inclusive, show that Timothy Hamilton died before January 1, 1906, and was not then in fact or in law a member of the Osage Tribe or upon the roll thereof.

9. No notice that the name of Timothy Hamilton was not included upon the roll prepared under authority of the act of June 28, 1906, was required by law to be given to the plaintiffs because the said roll was prepared, as required by the said statute, from the records of the United States at the Osage Indian Agency, one of which was the recorded proceedings of the December 4, 1905, meeting of the

Osage council and business committee which did then in fact
148 and in law and by Indian custom act for and on behalf of the
Osage Tribe and which then formally determined that Timothy Hamilton was born October 20, 1905, and died November 20, 1905. Concerning that meeting and notice thereof the plaintiffs have heretofore represented as follows in a petition to the Secretary of the Interior verified under oath by the plaintiff, Amos Hamilton, on December 29, 1932:

"That by resolution of the Osage council at a duly and regularly called meeting, after notice to the entire tribe, at which a full quorum (sic) was in attendance, and which was presided over by the acting United States Indian agent, and upon evidence, and due consideration it was adopted (sic). Said resolution ordered the enrollment of said Timothy Hamilton, together with a number of other new-born Osage children. Said resolution was adopted the 4th day of December 1905, and certified by the signatures of the attending chief, councilmen, and also that of the acting United States Indian agent. That in accordance with the said resolution which was made a part of the December 12, 1905, roll, and attached thereto, the name of Timothy Hamilton was entered and enrolled as No. 1967, son of Amos Hamilton, No. 391 on said roll."

10. The allegations of paragraph 10 of the plaintiffs' petition have heretofore been answered in paragraph 8 of this answer.

11. The defendant admits that beginning March 1906, and ever since that time plaintiffs have been denied any share in the tribal property of the Osage Indians on account of their son Timothy and says that the plaintiffs have not been and are not now entitled

to any such payment by reason of the appearance of the name of Timothy Hamilton upon the pay roll for December 1905, or for any other reason. The defendant further shows that ever since the approval of the final roll of the Osage Tribe which is attached hereto and marked "Exhibit A", per capita shares in tribal property and allotments and per capita payments provided for in the act of June 28, 1906, have been determined and made upon the basis of said final roll.

12. The petition referred to in paragraph 12 of the plaintiffs' present petition prayed for the restoration of the name of
149 Timothy Hamilton to the Osage tribal roll. Pursuant to that petition the defendant granted the plaintiffs a hearing which was duly held at the Osage Indian Agency on February 23, 1933, at which time the plaintiffs were given full opportunity to present evidence in support of their petition and did present evidence which consisted solely of oral testimony of the plaintiffs and certain other Indians testifying concerning their own recollection of the date upon which Timothy Hamilton died. None of the said witnesses could remember other events occurring at or about the same time as the death of Timothy Hamilton or at much more recent dates. After due consideration of all of the evidence and of the records of the Osage Agency the defendant, acting within his jurisdiction as Secretary of the Interior and in a quasijudicial capacity, by formal opinion, dated September 15, 1933, denied the petition of the plaintiffs. The defendant denies that the purport of that opinion is as stated by the plaintiffs and shows the full text of the opinion, copy of which has hereinabove been incorporated as exhibit B.

13. On September 22, 1933, the plaintiffs made further petition to the defendant as alleged in paragraph 13 of their present petition. After full hearing granted to the plaintiffs this petition was denied by a decision dated May 18, 1934, copy of which has hereinabove been incorporated as exhibit C. The defendant denies that the ground of the decision of September 15, 1933, was abandoned in the decision of May 18, 1934, or that there is any inconsistency whatever between these two decisions. The defendant denies that no official record in the Osage Indian Agency prior to January 1, 1906, contained any official entry of the death of Timothy Hamilton, and shows that
among the records hereinbefore set out and containing such
150 entry are the proceedings of the Osage tribal council or business committee dated December 4, 1905, and the annuity pay roll for December 1905.

14. The defendant denies that Timothy Hamilton died January 1, 1906. The defendant further denies that the legal effect of the act of June 28, 1906, was to provide for or to confirm the enrollment of any person who died prior to January 1, 1906, and says that an opinion of the Assistant Attorney General, approved by the Acting Secretary of the Interior on August 10, 1906, decides that members of the Osage Tribe who died prior to January 1, 1906, are not entitled to enrollment under the act of June 28, 1906, and that the said opinion, copy of which is marked "Exhibit J", is attached hereto

and prayed to be read as part hereof as if set out fully herein, is a correct interpretation of the law and was followed in the preparation of the final roll of the Osage Tribe. The defendant denies that it was the duty of the Secretary of the Interior to give notice to the plaintiffs of any proceeding to determine the date of the death of Timothy Hamilton and says that the Secretary of the Interior did and was lawfully entitled to rely upon the proceedings and resolution of the Osage council and business committee and the other records hereinbefore set out in determining the fact and date of the death of Timothy Hamilton.

Wherefore, the premises considered, the defendant having made full response to the rule to show cause, and having submitted his answer to the allegations of the plaintiffs' petition for writ of mandamus, prays that the petition be dismissed at plaintiffs' cost and that the defendant be permitted to go hence without day.

(S.) HAROLD L. ICKES,
Secretary of the Interior.

Attorneys for the defendant:

NATHAN R. MARGOLD,
Solicitor, Department of the Interior.

151 (S.) WILLIAM H. HASTIE,
Assistant Solicitor, Department of the Interior.

DISTRICT OF COLUMBIA, ss:

I, Harold L. Ickes, being duly sworn, state that I am the Secretary of the Interior, that I have read the above and foregoing answer by me subscribed, and that I verily believe that the facts set forth therein are true.

(S.) HAROLD L. ICKES.

Subscribed and sworn to before me this 13th day of September 1934.

[SEAL]

(S.) W. H. REICHARD,
Notary Public in and for the District of Columbia.

My commission expires August 10, 1939.

13

EXHIBIT A

[Copy]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS,

Washington, September 5, 1934.

I, E. J. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file or of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL]

(Sgd.) E. J. ARMSTRONG,
Acting Commissioner.

[Copy]

- 14 Refer in reply to the following:
Land.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 30, 1908.

CFH

Subject: Requests certified roll of Osage Tribe.

The U. S. INDIAN AGENT,

Osage Agency, Pawhuska, Oklahoma.

Sir: In view of the provisions of the act of Congress approved June 28, 1906 (34 Stat. L. 539), known as the Osage allotment act, it is desired that you prepare in triplicate as complete a roll as possible of the Osage Tribe of Indians and forward all parts to this office for approval by the Secretary of the Interior.

The roll should consist of (1) the names on the Osage tribal roll as it existed in your office on the first day of January, 1906; and (2) of the names of all persons, including adults and children, subsequently added thereto by direction of this office with the authority of the Secretary of the Interior in accordance with the provisions of section 1 of the act named.

The column for remarks in the roll should show the date and file number of the authority for each name added to the roll "as it existed on the first day of January, nineteen hundred and six."

You should properly certify to the correctness of the roll.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

WMW

Through the Commissioner to the Five Civilized Tribes.

(WL)

- 15 23866-08.
28152-11.

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
*The Osage Indian Agency,
Pawhuska, Oklahoma, Feb. 15, 1908.*

Subject: Transmits certified roll of Osage Tribe.

The honorable COMMISSIONER OF INDIAN AFFAIRS,

Washington, D. C.

Sir: Indian Office letter dated January 30, 1908, directs me to prepare in triplicate as complete a roll as possible of the Osage Tribe of Indians and forward all parts to the office for the approval of the Secretary of the Interior, in view of the provisions of the act of Congress approved June 28, 1906 (34 Stat. L. 539), known as the "Osage Allotment Act."

I am instructed that the roll should consist of (1) the names on the Osage Tribal roll as it existed in my office on the first day of January 1906; and (2) of the names of all persons, including adults

and children, subsequently added thereto by direction of the office with the authority of the Secretary of the Interior, in accordance with the provisions of section 1 of the act named.

This roll has been prepared as instructed and I have faith to believe will be found correct. It is transmitted by registered mail this date in three parts, and as the Allotting Commission desires to make up the allotment schedules in accordance therewith and are now working on the same, it goes without saying that I am anxious to have the roll approved at the earliest practicable date.

Since January 1, 1906, I have endeavored to verify the tribal roll at the time of each annuity payment, and while there has been no change made in the number of persons on the roll, a few changes have been necessary in order to have the names of persons entitled to enrollment appear on the roll properly. Many changes have been made in the manner of spelling full blood names which do not change or in any way effect the identity of the individual. It has been necessary to change the sex in some instances and mixed bloods have been given the opportunity to correct the names appearing in their respective families which through long years of copying from one roll to another, have in some inexplicable way become changed. Full explanation of changes where they have been great enough to warrant has been made in the column for remarks and I trust will be found sufficiently plain to warrant the approval of the roll as submitted.

Very respectfully,

RET MILLARD.
U. S. Indian Agent.

AWH-LaM.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, March 9, 1908.

17 Refer in reply to the following:
Land 12395—1908. 313.

Subject: Recommends approval of final roll of Osage Tribe.
The honorable the SECRETARY OF THE INTERIOR.

SIR: The office has the honor to submit herewith a roll, prepared in triplicate, of the Osage Tribe of Indians, Oklahoma, which contains the name of every person properly entitled to be thereon under the provisions of the act of Congress approved June 28, 1906 (34 Stat. L. 539), known as the "Osage Allotment Act."

The act named provides that the roll of the Osage Tribe of Indians shall consist of the names on the Osage tribal roll as it existed in the Osage Agency office on the first day of January 1906, with certain additions thereto, specified in the act, and subject to revisions by the Secretary of the Interior as therein indicated. The act provides also that—

"The said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final,

* * * and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided."

The roll has been carefully examined and compared in the office and is found to be correct; and as it will be of much benefit in the work of properly dividing the lands and funds of the tribe as provided in the act mentioned, it is recommended that it be approved, in triplicate.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

WMW—I.
Enclosures.

Approved: Apr. 11, 1908.

JAMES RUDOLPH GARFIELD,
Secretary.

Received Feb. 20, 1908, Office of Indian Affairs. File 313. 12395.

Original

Certified Roll of Osages in Oklahoma

Act of Congress, June 28, 1906

Certified Roll of Osages in Oklahoma

Act of Congress, June 28, 1906

On roll 2230.

Explanatory.—Column one shows number adopted by Osage Allotment Commission, column two gives the numbers on the 1906 annuity roll, the roll first made in the Indian agent's office after January 1, 1906, the third column gives consecutive numbers of this roll, column four gives the names of members as they appear at this date, February 15, 1908, showing relationship, age, and sex as they appear on the agency roll and will appear on the next regular annuity roll.

English names of many full bloods who have both Indian and English names are shown in the remarks column, and spelling of full-blood names has been corrected where necessary, and no remarks made where identity or similarity is not destroyed.

Corrections in names, relationship, age, and sex have been made upon verification of the rolls at time of annuity payments made subsequent to January 1, 1906, by interrogating parents and adult members of the tribe as to such points in connection with themselves and their respective families, using a competent interpreter and witnesses with those members who do not speak and understand the English language.

Office authorities for making additions to the tribal roll since January 1, 1906, are cited at the end of this roll and referred to by number opposite names of members effected.

Allotment no.	No. Mch. 1906 roll	No. this roll	Name	Relation	Age	Sex	Remarks
BIG CHIEF BAND							
1	1	1	Pah-hu-scah.....	Head..	49	M	Tom Big Chief.
2	2	2	Me-to-op-pe.....	Wife..	35	F	
3	3	3	He-ah-to-me.....	Daut..	17	F	May White.
4	4	4	Heh-kahemon-kah.....	do....	9	F	
5	5	5	Gra-to-me.....	do....	5	F	
2178	-----	6	He-e-ke-op-pe (dead).....	do....	9da	F	{ Born 1-27-1907. Died 2-7-1907. Auth. no. 22. Died 9-11-1907.
6	6	7	Nah-me-tsa-he (dead).....	Head..	70	F	
7	7	8	Mo-she-to-moie.....	Head..	64	M	
8	8	9	Mo-se-che-he.....	Wife..	64	F	

[Pages 21 to 112, inclusive, omitted in printing.]

113

AGENT'S CERTIFICATE

I hereby certify, on honor, that the foregoing roll from page one (1) to page ninety-three (93), including the names of two thousand two hundred and thirty (2,230) persons, contains the names of all persons on the tribal roll of the Osage Indians in Oklahoma as it existed on the first day of January, 1906, necessary changes in spelling and preparing names to conform to the facts having been made as indicated in the explanatory note on the first page hereof, and of the names of all persons including adults and children subsequently added to the said Osage Tribal roll by direction of the Office of the Commissioner of Indian Affairs, Washington, D. C., with the authority of the Secretary of the Interior, in accordance with the provisions of Section One (1) of the Act of Congress approved June 28, 1906, (34 Stat. L., 539), known as the Osage Allotment Act.

RET MILLARD,
U. S. Indian Agent.

OSAGE INDIAN AGENCY,
Pawhuska, Oklahoma, February 15, 1908.

C. F. L. Apr. 11, 1908.

DEPARTMENT OF THE INTERIOR,
Washington, March , 1908.

The foregoing certified roll of members of the Osage Tribe of Indians in Oklahoma, prepared in accordance with the provisions of the act of Congress of June 28, 1906 (34 Stat. L. 539), embracing the names of 2,230 persons as shown on the foregoing pages, numbered 1 to 93, inclusive, is hereby approved.

JAMES RUDOLPH GARFIELD,
Secretary.

EXHIBIT B

[Copy]

THE SECRETARY OF THE INTERIOR,
Washington, Sept. 15, 1933.

MESSRS. THOMAS L. SLOAN,
WEBSTER BALLINGER,
(Attorneys);
AMOS HAMILTON,
(Petitioner).

GENTLEMAN: This will refer to your application for the enrollment of Timothy Hamilton with the Osage Tribe of Indians in Oklahoma, in regard to which hearings were held at the Osage Agency and before the acting solicitor for this Department.

The act of June 28, 1906 (34 Stat. L. 539), provides, in effect, that a roll shall be made of the Osage Indians, including those members of the tribe whose names appear on the roll at the agency on January 1, 1906, and children born to them between said date and July 1, 1907; and that, after approval by the Secretary of the Interior, said roll shall constitute the final roll of the tribe.

Such a roll was approved by the Secretary of the Interior on April 11, 1908. In his opinion of August 10, 1906, the Assistant Attorney General held that persons who had died before January 1, 1906, were not entitled to enrollment on the final roll, even though their names appeared on the roll at the Osage Agency on the above date, as in effect, they were automatically removed therefrom by death.

The agency records indicated that Timothy Hamilton had died in November 1905, and therefore his name was omitted from the final approved roll, in accordance with said opinion. You now seek to have his name placed on the roll as a member of the Osage Tribe on the ground of an alleged mistake of fact in that, it is asserted, he really died about four thirty o'clock on the morning of January 1, 1906, and hence, being alive on that date, was entitled to enrollment under the act. The agency records as to the birth and death of Timothy Hamilton may be summarized as follows:

Roll for September 1905, payment: Notation under Amos Hamilton family group "Timothy, born Oct. 20/05."

Minutes of tribal council held on December 4, 1905: Timothy Hamilton; born October 20, 1905; died Nov. 20, 1905.

115 Roll for December 1905 payment: Timothy Hamilton; born October 20, 1905. Died Nov. 17, 1905.

Roll for March 1906 payment: Timothy Hamilton; died Nov. 19, 1905.

Official record of births at Osage Agency: Timothy Hamilton; born October 20, 1905.

Official record of deaths at Osage Agency: Timothy Hamilton; died November 19, 1905.

The approval of a roll as of a given date by the Secretary of the Interior establishes the existence at that time of all facts essential to its preparation in accordance with the applicable law (*Malone v. Alderdice*, 212 Fed. 668; *United States v. Atkins*, 260 U. S. 220). Such a roll is presumptively correct and, unless impeached by very

clear evidence of fraud, mistake, or arbitrary action, conclusive (*United States v. Wildcat*, 244 U. S. 111).

An essential fact in the preparation of the Osage final roll was whether or not Timothy Hamilton was alive on January 1, 1906, because upon that fact depended his right to enrollment. Therefore, the approval of the roll without his name thereon, taken in connection with the agency records, as above, constituted a finding of fact by the Secretary of the Interior that he died before that date; and this finding carries with it a presumption of correctness which can not be overthrown except by conclusive proof that a mistake was made.

The testimony of Mr. and Mrs. Hamilton, the only persons claimed to be present when the child died, that Timothy's death occurred about four thirty o'clock on the morning of January 1, 1906; and that of other witnesses as to the preparation of the body, manufacture of the coffin, digging of the grave, and the burial, all of which it is stated took place on that day, was entirely from memory and was given twenty-seven years after the events to which the testimony relates. This is also true of the affidavit of Dr. Ira Mullins, the attending physician, executed in 1929, which states, "to the best of my knowledge" Timothy Hamilton died *about* January 1, 1906. Dr. Mullins subsequently advised the superintendent that his original records were destroyed by fire in 1918, eleven years before he made the affidavit.

The entire record in this case, and your briefs and oral arguments have been carefully considered. It is not considered that the testimony at the hearing, based entirely on recollection after the passage of twenty-seven years, and with the agency records to the contrary, and with the adverse finding of the Secretary of the Interior (in the approval of the roll without his name on April 11, 1908), that he died before January 1, 1906, is sufficient affirmatively to establish the fact that Timothy Hamilton was alive at any time on January 1, 1906.

116 Therefore, your application for his enrollment with the Osage Tribe of Indians is denied.

Sincerely yours,

(Sgd.) HAROLD L. ICKES,
Secretary of the Interior.

(9-WL-16)

117

EXHIBIT C

[Copy]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,

Washington, May 18, 1934.

THOMAS L. SLOAN and WEBSTER BALLINGER, Esqs.,
Attorneys at Law,
Washington, D. C.

GENTLEMEN: This will refer to the petition filed by you as attorneys for Amos and Marie Hamilton asking that Osage annuities allegedly due their deceased son, Timothy Hamilton, be paid to them as sole heirs and next of kin.

The petition is in the nature of a request for reconsideration of departmental decision of September 15, 1933, declining to recognize the said Timothy Hamilton as an enrolled member of the Osage Tribe of Indians in Oklahoma under the provisions of the act of June 28, 1906 (34 Stat. 539).

An examination of the petition and supporting briefs, the opposing brief of the attorney for the Osage Tribe, and the transcript of the hearing held before me on January 22, discloses that but two material questions are involved. These questions are, first, whether Timothy Hamilton was alive on January 1, 1906, and second, whether the name of Timothy Hamilton was in fact on the Osage tribal membership roll which the act of June 28, 1906, *supra*, declared "to be the roll of said tribe and to constitute the legal membership thereof."

The first question is one of fact and was fully considered in departmental decision of September 15, 1933. In that decision it was found that the evidence submitted on behalf of the petitioners was insufficient, in view of the records of the Osage Indian Agency to the contrary, to "establish the fact that Timothy Hamilton was alive at any time on January 1, 1906." No new evidence has been submitted, and a further review of the record, including the evidence heretofore presented, fails to disclose that the conclusion reached in the decision of September 15, 1933, is in error.

The second question turns upon the construction to be placed upon that part of section 1 of the act of June 28, 1906, *supra*, which reads:

"That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to
118 *members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof."* (Italics supplied.)

The act further provides for an investigation to be made of cases involving fraudulent enrollment, and after authorizing the Secretary of the Interior to strike from the roll, the names of persons or their descendants found to have been placed on the roll through fraud, declares that the roll after revision and approval by the Secretary of the Interior shall constitute the approved roll of the Osage Tribe and that the action of the Secretary of the Interior in revising the roll shall be final.

The roll was completed and approved by the Secretary of the Interior on April 11, 1908, and under the terms of the act, formed the basis for an equal division of the tribal property among the members whose names appeared thereon. The name of Timothy Hamilton is not on that roll. However, shortly prior to January 1, 1906, to wit, December 12, 1905, a roll had been completed of the Osage Tribe

for the purpose of making a per capita payment to its members. The contention is made that that roll, upon which the name of Timothy Hamilton appears, is the roll which Congress by section 1 of the act of 1906 declared to be the roll of the tribe and to constitute its legal membership, and that the Secretary of the Interior was without authority or jurisdiction to make any inquiry into the enrollment of Timothy Hamilton or to disturb his enrollment. This contention is based upon a plain misconception of the law.

Anterior to the act of June 28, 1906, the lands and funds of the Osage Tribe belonged to the tribe as a community, and not to the members severally or as tenants in common. The rights of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise, the right was at an end. It was not alienable or descendible. *Gritts v. Fisher*, 224 U. S. 640, 642; *Sizemore v. Brady*, 235 U. S. 441, 447; *La Roque v. United States*, 239 U. S. 62, 66. When children were born into the tribe they became thereby members and entitled to all the rights incident to that relation. The membership of the Osage Tribe was thus constantly changing through deaths and births, and as payments were made to the members from the tribal revenue, the membership on each occasion was determined by taking the previous roll as a primary guide, eliminating the names of Indians who had died and adding the names of children subsequently born into the tribe. Under long-established departmental regulations, the rolls so made often include the name of a person who had previously died for the sole purpose of making one payment after death. The roll of December 12, 1905, on which the name of Timothy Hamilton appears was made in the manner just described.

It plainly appears from the language used in section 1 of the act of 1906 that the roll of December 12, 1905, was not confirmed
119 as to all names appearing on that roll. The section refers in express terms to the roll as it existed, not on December 12, 1905, but on January 1, 1906. It comprehends a roll depicting the legal membership of the tribe on the latter date, and under the rule that death terminates tribal membership, the names of persons who had died prior to January 1, 1906, were automatically excluded from the roll. The Department so ruled early in the administration of the act. In an opinion by the Assistant Attorney General, approved by the Secretary of the Interior on August 10, 1906, it was said:

"January 1, 1906, is the important date in this legislation. It is clearly intended that all members of the tribe in being on that day shall share in the distribution of the tribal property. The lands and funds of the tribe were communal property in which no individual held a separate interest or one that would descend at his death to his heirs. By death the interest of the individual in the tribal property terminated. Only those living January 1, 1906, had any interest therein that day. None could claim any interest by inheritance but held alone by virtue of his personal right of membership in the tribe. The membership of the tribe as it was constituted January 1, 1906, must be treated as the thing had in view by the law. An individual who died before that date was not then a member of the tribe and for the purposes of division of the tribal property under this act it must be considered that his name was erased from the tribal roll at the time of his death."

The records of the Osage Indian Agency, which the act required be taken into consideration in determining the roll in existence on January 1, 1906, and which must be regarded as conclusive at this late date, establish that Timothy Hamilton died prior to January 1, 1906. His name was not removed from the roll by the Secretary of the Interior, but by death. The membership roll in existence on January 1, 1906, did not, therefore, contain the name of Timothy Hamilton, and as his interest in the tribal property terminated with his death, nothing passed to his heirs or next of kin.

The petition is therefore denied.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

120

EXHIBIT D

[Copy]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Sept. 5, 1934.

I, E. J. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file at the Osage Agency.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL]

(Sgd.) E. J. ARMSTRONG,
Acting Commissioner.

122

EXHIBIT E

[Copy]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Sep. 5, 1934.

I, E. J. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appear of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL.]

(Sgd.) E. J. ARMSTRONG,
Acting Commissioner.

123

COUNCIL PROCEEDINGS

Proceedings had by the Osage Council or business committee at a meeting held in the council chamber of the council house at Pawhuska, Oklahoma, beginning Monday, December 4, 1905, which meeting was held in pursuance to a call issued by the U. S. Indian agent for the purpose of considering applications for the enrollment of children born to Osage parents and to discuss and act upon any other matters brought to the attention of the body of interest or pertaining to the Osage Tribe of Indians.

Record of Births among Indians of

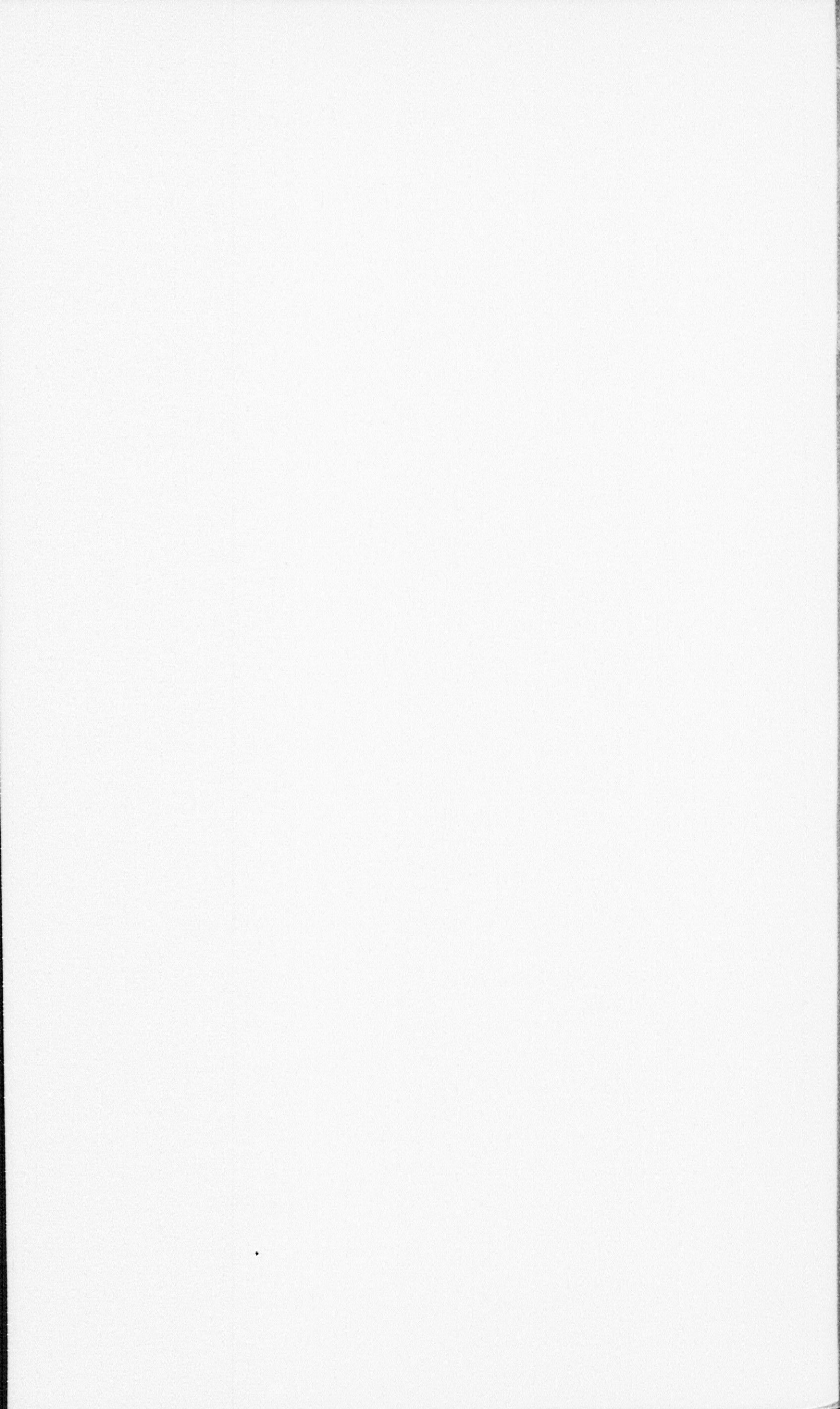
Osage

Agency

5-65

CHILD'S NUMBER ON THIS RECORD.	PARENTS' NUMBERS ON FAMILY REGISTER.	NAME.	DATE OF CHILD'S BIRTH.	SEX OF CHILD.	AGES OF PAR- ENTS.	BLOOD OR NATIONALITY OF PARENTS.	TRIBE, OR ALLEGIANCE BY CITIZENSHIP, OF PARENTS.
1037	Father,	George Corlison			24	Mixed Blood	Osage
	Mother,	A white woman				American	U. S. Citizen
350	Child,	George Corlison	Aug 14/05	M			
1550	Father,	William Reed			40	Mixed Blood	Osage
	Mother,	A white woman				American	U. S. Citizen
351	Child,	Glenn Reed	July 31/05	F			
1732	Father,	John Tugreen			23	Mixed Blood	Osage
	Mother,	A white woman				American	U. S. Citizen
352	Child,	Agnes Tugreen	July 22/05	F			
470	Father,	Ben Mus Leeen Mus Lee			22	Full Blood	Osage
522	Mother,	Helen Leeen Mus Lee			17	"	"
353	Child,	Helen Mus Leeen Mus Lee	Aug 26/05	M			
47	Father,	Mr. Leeen Mus Leeen Mus Lee			48	Full Blood	Osage
	Mother,	Helen Leeen Mus Lee			34	"	"
354	Child,	Mr. Leeen Mus Leeen Mus Lee	Sept-4/05	F			
121	Father,	Amos Osage			33	"	"
122	Mother,	Mr. Leeen Mus Leeen Mus Lee			24	"	"

151	Father,	Ma ti an kile		42	"	"
152	Mother,	Mo se che he		36	"	"
356	Child,	Nah ne an kile	Oct-10/05 M			
275	Father,	Ben Harrison		33	"	"
	Mother,	A white woman			American	H. S. Cartwright
357	Child,	Emile M. Harrison	Nov 24/05 M			
	Father,					
358	Mother,	Wah ho sah moie		36	Full Blood	Osage
359	Child,	Loe to the in kile	Dec 5/05	M		Died Dec 1905
35-	Father,	E was Tall Chief		27	"	Osage
	Mother,	Wah shah		25	"	"
357	Child,	Halim	Oct-21/05 F			
395	Father,	De wallu		37	"	"
	Mother,	Ma lue he		27	"	"
360	Child,	Wah pah se	Oct-11/05 M			Died Oct 11/05
404	Father,	Amos Hammitton		33	"	Osage
	Mother,	A Pueblo Indian woman			"	Pueblo
✓361	Child,	Timothy	Oct-20/05 M			
520	Father,	John Whittemore		22	"	Osage
	Mother,	A white woman			American	H. S. Cartwright
362	Child,	James	Oct-27/05 M			
547	Father,	John Wa go ohe		27	Full Blood	Osage
	Mother,	Wah shah ohe me lue he		27	"	"
363	Child,	A man to op he	Oct-14/05 F			



The meeting was called to order by A. W. Hurley, acting Indian agent, in the absence of Frank Frantz, U. S. Indian agent, who was at Washington under orders, at 10:00 o'clock a. m. of Monday, December 4, 1905. Upon calling the roll all members of the council or committee were found present as follows:

O-lo-hah-wal-la, principal chief; Bacon Rind, asst. principal chief; Me-kah-wah-ti-an-kah, member; Francis Claremore, member; O-lo-hah-moie, member; W. S. Mathews, member; Tom West, member; Frank Corndropper, member; Julian Trumbly, member; Charles Me-she-tse-he, member.

Twenty-nine applications of Osage parents married prior to June 7, 1897, for the enrollment of their children, were considered separately by the council and acted upon favorably in the following resolution:

Resolution

We, the undersigned members of the Osage Council or business committee, in meeting assembled this 4th day of December 1905, for the purpose of considering applications for the enrollment of Osage children born to Osage parents, having passed upon said applications, find the following children entitled to enrollment and respectfully request that their names be placed on the December 1905 annuity roll, as per the following schedule, showing the number of the head of family, name of parent, name of child, sex, and date of birth:

Number on September annuity roll	Name of parent	Name of child	Sex	Date of birth
52	Me-ke-wah-ti-an-kan	Me-to-oppe	F	Sep. 9, 1905
122	Amos Osage	He-ke-oppe ¹	F	Oct. 24, 1905
146	Wah-ne-en-kah	Me-ti-an-kah ¹	M	Oct. 10, 1905
124				
272	Ben Harrison	Edith M. Harrison	F	Nov. 24, 1905
317	Wah-ko-sah-moie	Che-to-kah-in-kah	M	Dec. 3, 1905
337	Eves Tall Chief	Helen Tall Chief	F	Oct. 21, 1905
372	Ne-wah-la	Nome-peh-se ²	M	Oct. 11, 1905
386	Amos Hamilton	Timothy Hamilton ³	M	Oct. 20, 1905
507	John Whitehorn	James Whitehorn	M	Oct. 5, 1905
537	John Wa-go-she	A-non-to-po-pe	M	Oct. 14, 1905
601	Pah-se-to-pah	Lena Pah-se-to-pah	F	Nov. 8, 1905
634	A-she-gah-hre	Va-sah-pah-shin	M	Nov. 18, 1905
646	Clarence Gray	Karl Gray	M	Oct. 2, 1905
720	Hlu-ah-shu-tsa	Alice Red Eagle	F	Sep. 14, 1905
749	George Bigheart	Charles Bigheart	M	Sep. 5, 1905
752	Claude Smith	Ke-ah-sum-pah	F	Nov. 15, 1905
816	James Whitehorn	Mary Whitehorn	F	Oct. 3, 1905
968	Joe Bryant	Arena Bryant	F	Nov. 22, 1905
1,040	Woodie Connor	Theil L. Connor	F	June 5, 1905
1,140	Stanislaus Ducotey	Frank S. Ducotey	M	Sep. 5, 1905
1,195	James M. George	James Ira George	M	Nov. 24, 1905
1,358	Frant Lessert, Jr.	Cora L. Lessert	F	Oct. 24, 1905
1,424	Emery Martin	John D. Martin	M	Nov. 13, 1905
1,519	John Pappin	Jeremiah Pappin	M	Nov. 10, 1905
1,609	James Revelette	Marry E. Revelette	F	Oct. 9, 1905
1,609	James Revelette	Minnie F. Rivelette	F	Oct. 9, 1906
1,672	Josephine Ririe	Arthur M. Ririe	M	Nov. 26, 1905
1,748	Mary L. Simpkins	Virgil Simpkins	M	Nov. 4, 1905
1,885	Clarence Trumbly	Clarence E. Trumbly	M	Oct. 11, 1905

¹ Died Nov. 3, 1905.

² Died Oct. 11, 1905.

³ Died Nov. 20, 1905.

The council then adjourned until 2:00 p. m., this day.

The council met pursuant to adjournment at 2:00 p. m., with all members present.

Assistant Principal Chief Bacon Rind here brought to the attention of the council the fact that several years ago when Wah-ti-an-kah, head of the Wah-ti-an-kah Band, died, he, Bacon Rind, was elected to succeed him, but through a ruling of the then Indian agent, Moh-sah-mum-pah was placed at the head of the band, and has since been recognized by the agency office as its chief or headman, thus depriving him, Bacon Rind, a position to which he was justly entitled.

Bacon Rind explained that according to the Indian custom, which gave to a chief or a headman of a band the right to
125 name his successor in case of death or retirement from office,

Wah-ti-an-kah had on his death bed selected him, Bacon Rind, to succeed him, and turned over to him all of his documents and announced him as his choice in the presence of relatives and others present just before he died; that an election subsequently held by the members of this band selected him, Bacon Rind, to succeed the dead chief, but Moh-sah-mum-pah, who was an aspirant for the place obtained the right to assume the position from the then Indian agent, one reason for so doing being that Bacon Rind was at that time enrolled in another band and the agent did not care to transfer his name.

After a long and general discussion Charles Me-she-tse-he moved that the present agent be requested to restore to Bacon Rind his rights and that he be enrolled and recognized as the head of the Wah-ti-an-kah Band, he being of the same relation to the deceased headman as Moh-sah-mum-pah (nephew), and having been named by the deceased to succeed as the head of the band as well as having been elected by the members of the band, as evidenced by Black Dog, Claremore, Pah-hu-scah, Ne-kah-ke-pah-nah and Wah-tsa-wah-hu, members of the Osage Tribe who are witnesses to Bacon Rind's selection. This move was seconded by Councilman Corndropper and passed by an unanimous vote of the council.

The matter of considering applications for the enrollment of children born to Indian women as the result of marriages with white men contracted after June 7, 1897, was introduced and the council notified that several such applications were ready to be presented to them. Assistant Principal Chief Bacon Rind took the floor and in rather a lengthy argument expressed himself as not being ready
126 to act favorably on these applications at this time. It was not his desire to deprive anyone of that to which he or she was justly entitled, but in his opinion there were several mixed-blood Indians now on the Osage tribal rolls whose rights to be there has never been fully established to the satisfaction of the tribe, especially the fully blood portion thereof. He thought that these applicants should wait until an act of Congress dividing the tribal lands and funds, which would provide for investigating the rights of all to be enrolled and recognized, might be obtained.

It being late the council adjourned until Tuesday.

Council met Tuesday morning, December 5, 1905, at 9:30 o'clock pursuant to adjournment with all members present.

The matter of children born of white fathers, which was under discussion when the council adjourned on Monday evening, was taken up and the following applications submitted:

No. on Sep-tember annuity roll	Name of mother	Name of child	Sex	Date of birth
421	Prudie Martin.....	Christina Martin.....	F	Aug. 27, 1903
922	Ida M. Bowhan.....	Francis D. Bowhan.....	M	Apr. 30, 1901
922	Ida M. Bowhan.....	Sewell D. Bowhan.....	M	Sept. 4, 1903
923	Marie B. Bowhan.....	Clifford N. Bowhan.....	M	Dec. 1, 1905
985	Polly Buxbaum.....	Vernon E. Buxbaum.....	F	Oct. 19, 1905
1044	Ida Cottingham.....	Leota Cottingham.....	F	Nov. 22, 1903
1044	Ida Cottingham.....	Logan Cottingham.....	M	Oct. 29, 1905
1222	Pearl Hayes.....	Olivia Hayes.....	F	Apr. 14, 1902
1222	Pearl Hayes.....	Elizabeth Hayes.....	F	July 24, 1904
1215	Clara Goad.....	May Goad.....	F	May 23, 1904
1215	Clara Goad.....	Cecil J. Goad.....	M	Mar. 21, 1902
1230	Mary Haynie.....	John C. Haynie.....	M	Nov. 23, 1905
1298	Laura Jones.....	James F. Jones.....	M	Apr. 10, 1905
1374	Coenia Liese.....	Waskaki Liese.....	M	Sept. 8, 1905
1450	Arania Mickels.....	Clarence D. Mickels.....	M	June 23, 1905
1532	Minnie Pease.....	Marion H. Pease.....	M	Feb. 2, 1905
1561	Josephine Peters.....	James M. Peters.....	M	Aug. 27, 1899
1793	Celestine Swanson.....	Joseph N. Swanson.....	M	Oct. 9, 1793
1905	Effie Wade.....	Merle C. Wade.....	M	Sept. 22, 1903

After a long and general discussion in which the half-breed members of the council favored the enrollment of the children and the full-blood members opposed, on motion of Councilman Me-
 127 kah-wah-ti-an-kah, seconded by Councilman Charles Me-she-tse-he, the children were not enrolled by a vote of six full-blood councilmen against two mixed-blood councilmen.

The reason given for not enrolling these children at this time being that expressed by Assistant Principal Chief Bacon Rind in his talk on the subject Monday afternoon. The full-blood members who spoke against enrolling the children, all stated that it was not their desire to deprive any of the applicants of their just rights, but as many of the mixed bloods were not known to them and they did not know whether the parents had a right on the rolls or not, they preferred to let the matter wait until an investigation of the rolls could be made under some act of Congress providing for such a procedure, when no doubt all those entitled to enrollment would be placed on the tribal rolls and given full rights and benefits as members of the Osage Tribe of Indians.

At this time the principal chief informed the council that there was presented for consideration a proposition for an oil lease on that portion of the reservation not already covered by leases heretofore granted by the Department and the council.

Councilman Trumbly felt that the council should not consider the proposition at this time, as the lease granted to James S. Glenn in September had not as yet received departmental approval, and the people residing in the western part of the reservation had not been consulted with in the matter. Councilman moved that action be deferred until some future meeting, this motion was not seconded. Councilman Mathews then moved that the application be read and considered; the motion was seconded by Councilman Corndropper, and passed by a vote of seven to one.

The proposition was then read, interpreted and filed, after which, the council adjourned until 2:00 p. m.

128 Council met pursuant to adjournment at 2:30 p. m. All members present.

The application of George L. Craig, of Pittsburgh, Pa., for a lease on a certain portion of the reservation for mining purposes for the production of petroleum and natural gas, as read in the foregoing session, was taken up for consideration.

The proposition is as follows:

"I hereby make application for a lease on all that part of the Osage Indian Reservation, Oklahoma, lying west of range 8, not otherwise embraced within the 680,000 acres covered by the renewal of the Edwin B. Foster oil & gas lease, for the period of ten years, for mining purposes for the production of petroleum and natural gas, only, said lease to date from the expiration of the lease now held by the Indian Territory Illuminating Oil Company through assignment of the Edwin B. Foster lease, it being understood that this lease shall not include lands designated for town site purposes in the Indian Appropriation Act of Congress, approved March 3, 1905.

"In consideration of this lease, I hereby agree to pay to the Osage Nation one-eighth ($\frac{1}{8}$) of all crude petroleum mined or produced from said lands, as the same is delivered free in tanks at the wells or places where produced, and one hundred (\$100.00) dollars per annum for each gas well that may be developed and used commercially, so long as said gas well is used commercially by me or those under me, said royalties to be based upon the market value of the products produced at the place of production and to be paid as directed by the Secretary of the Interior, for the use and benefit of the Osage Tribe of Indians, and subject to all the provisions and penalties imposed in other leases of the character herein asked for and stipulated in a contract recently awarded to one James S. Glenn.

"It is further agreed that the Osage Nation shall have the right to the free use of gas for all Government schools and all other public buildings of the Nation from any well or wells that may be discovered on said land, or from any gas line which I may have in operation and this right shall also extend to all citizens of the Nation for domestic purposes: Provided that no expense shall be incurred by me in piping gas for such purposes.

"I further agree that I will not remove from the land leased to me any buildings or improvements erected thereon during the term of this lease, but said buildings and improvements shall become a part of the land and shall remain thereon and become the property of the Osage Nation, as a part of the consideration of the lease: Provided that all engines, boilers, tools, and other machinery shall remain my property and be subject to removal at expiration of my lease. The usual clause as to lien upon improvements to secure rental, etc., to be incorporated in the lease.

"It is further agreed if prospecting under my lease is not actively begun within thirty days after the lease becomes effective and receives the approval of the Hon. Secretary of the Interior and

prospecting continued continuously until there shall have been drilled in fifteen different townships, one well in each township, making a total of fifteen wells, and if one

* * * * *

129 Chief.

O. LO HAH WALLA (his x mark),
Principal Chief.

BACON RUIO (his x mark),
Asst. Principal Chief.

HARRY KOHPAY,
Witness to all signatures.

Councilmen

W. S. MATHEWS.
ME KI WAH BIAU KAH
(his x mark).
FRANCIS CLAREMORE.
ME KI TIAU KAH
(his x mark).

TOM WEST.
JULIAN TRUMBLY.
FRANK CERNDROPPER.
CHARLIE ME SHE THEA
(his x mark).

I, Harry Kohpay, hereby certify, on honor, that I am the official interpreter of the Osage Tribe of Indians; that the above-named persons constitute a majority of the council of the tribe; and that they have been duly empowered by the tribe to transact all business of the tribe; that I have correctly interpreted and fully explained the foregoing council proceedings to them; that they fully understood the contents thereof, and that I witnessed the signing of this instrument by them this seventh day of December, A. D. 1905.

HARRY KOHPAY,
Acting interpreter.

I, A. W. Hurley, acting U. S. Indian agent for the Osage Agency, Oklahoma, hereby certify that the above is a true record of the proceedings of the Osage business committee or council.

Acting Indian Agent.

OSAGE INDIAN AGENCY,
Pawhuska, Oklahoma, December 7, 1905.

130

EXHIBIT F

[Copy]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 5, 1934.

I, E. J. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the paper (page 39, annuity pay roll, December 1905) hereto attached is a true copy of the original as the same appears on file at the Osage Agency.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL]

(Sgd.) E. J. ARMSTRONG,
Acting Commissioner.

132

EXHIBIT G

[Copy]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 5, 1934.

I, E. J. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears on file at the Osage Agency.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL]

(Sgd.) E. J. ARMSTRONG,
Acting Commissioner.

134

EXHIBIT H

[Copy]

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 5, 1934.

I, E. J. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the paper (page 9, annuity pay roll, March 1906) hereto attached is a true copy of the original as the same appears on file at the Osage Agency.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

[SEAL]

(Sgd.) E. J. ARMSTRONG,
Acting Commissioner.

136

EXHIBIT J

Ind. Div.

DEPARTMENT OF THE INTERIOR,
Washington, August 10, 1906.

The SECRETARY OF THE INTERIOR.

SIR: The Commissioner of Indian Affairs, having submitted for your decision and such directions as you might be pleased to give certain questions which he says will undoubtedly confront the allotting commission under the act approved June 28, 1906 (Public, No. 321), entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes", the matter has been submitted for my opinion.

This act provides in part as follows:

"That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian

ANNUITY

6-02

NO.		NAMES.	AGE.	SEX.	PER CAPITA.	AMOUNT PAID.
LAST.	PRESENT.					
AMOUNT BROUGHT FORWARD,						
1909	1925	Whites Francis M.	Orphan	16	M	45 00
110	1926	Wheeler Paul	Head	35	M	45 00
11	7	Merritt J.	Son	2	M	45 00
12	8	Geneva	Daut	1	F	45 00
						135 00
1913	1929	Wheeler Elmer	Head	36	M	45 00
14	30	Eva E.	Wife	38	F	45 00
15	1	Virginia	Daut	1	F	45 00
						135 00
1916	1932	Wheeler Lavaria	Head	25	F	45 00
						45 00
1917	1933	Wheeler Alma	Head	20	F	45 00
						45 00
1918	1934	Wheeler Anna	Head	22	F	45 00
						45 00
1919	1935	Wheeler Susan	Head	28	F	45 00
						45 00
1920	1936	Wilkie Arnold	Head	23	M	45 00
						45 00
1921	1937	Wilkie Louis F.	Head	19	M	45 00
						45 00
1922	1938	Wilson Mary	Head	27	F	45 00
3	9	William E.	Son	8	M	45 00
4	40	Julia K.	Daut	6	F	45 00
5	1	Banlie	Son	4	M	45 00
6	2	Andry	Daut	1	F	45 00
						225 00
1927	1945	Woodring Tena	Head	30	F	45 00
8	4	Carlton W.	Son	10	M	45 00
9	5	Orville W.	"	8	M	45 00
30	6	Anna	Daut	4	F	45 00
						180 00
1932	1947	Woodham Lucy	Head	55	F	45 00
						45 00

84960 00

Lucy Wo

PAY ROLL.

MARKS AND SIGNATURES.

SIGNATURES OF WITNESSES.

DATE OF RECEIPT.

REMARKS.

Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	441 687
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	441 716
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	441 919
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 607
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 415
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 532
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 413
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 414
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 418
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	442 387
Wheeler	Hill Loomer	H. Kohpay	DEC 13 1905	441 920

BEST COPY AVAILABLE

from the original bound volume

1938	1948	Wyrick Mary	Head	32	F	45 00
	3	Jessie	Daut	9	F	45 00
	50	John H.	Son	3	M	45 00
	1	Elnora J.	Daut	4	F	45 00
	3	Elmer F.	Son	1	M	45 00

225 00

Mary Wyrick
June 30 6

1937	1953	Yeorgain Estella	Daut	17	F	45 00
	4	Early I.	Son	14	M	45 00
	5	Verona C.	Daut	13	F	45 00
	6	Leona	"	11	F	45 00

Application for pay made to I. O.
 Application for pay made to I. O.
 Application for pay made to I. O.

Apr 20 1956
1956
1956

1941	1957	Hooper Sallie	Head	34	F	45 00
	3	Mary	Daut	11	F	45 00

75 00

Sallie Hooper, her X mar

1943	1959	Siggins Clara	Head	43	F	45 00
	60	Andrew W.	Son	14	M	45 00

75 00

Clara Siggins, her X mar

ADDITIONAL BIRTHS.

192	1934	Amos Osage	Head			
	1961	He-ke-op-pe *	Daut	1/12	F	45 00

45 00

Amos Osage

273	375	Ben. Harrison	Head	33	M	
	1963	Estella M. Harrison	Daut	1/12	F	45 00

45 00

Ben Harrison

601	607	Pah-se-to-pah	Head	35	M	
	1963	Yena	Daut	1/12	F	45 00

45 00

Pah-se-to-pah, his X mar

733	766	Claude Smith	Head	31	M	
	1966	Ke-ah-sun-pah	Daut	1/12	F	45 00

45 00

Claude Smith

816	833	James Whitehorn	Head	21	M	
	1963	Mary	Daut	2/12	F	45 00

45 00

James Whitehorn

886	391	Amos Hamilton	Head	33	M	
	1967	Finothy	Son	2/12	M	45 00

45 00

Amos Hamilton

968	978	Bryant Joe	Head	42	M	
	1968	Arena	Daut	1/12	F	45 00

45 00

Joe Bryant

1353	1367	Leasport Frank jr	Head	41	M	
	1969	Cora L.	Daut	1/12	F	45 00

45 00

Frank Leasport

AMOUNT CARRIED FORWARD.

86685 00

1964 will be found on page 14.
 1946 will be found under letter A. 1946/55 enrolled with parents in regular order on roll.

Илл Луиис Н. Коппай

442498

20 6 by Grace Ferguson

Am Lower St Kohpay

$\frac{1}{3} \neq 195.7$

Mr Loomer H Kohpay

1/2 8 # 1959

Alfred Loomis H. Kohpau

441 788-9
Born Oct. 24, 05.
+ died Nov. 10, 1905

Алгебра Кохрей

442472—
BORN NOV. 24, 05.

Али Ломов Н. Копыт

DEC 12 1905 441 3-89
Born Nov. 8, 05.

The Lower H Kohpay

241362
Born Nov. 16, 05

Am Loomer H. Kohpay

DEC 12 1905 Born Oct. 3, 05. 44 30 52

2v Still Loomer H Kohp air

DEC 12 1905 441582
Born Oct. 30, 05.

~~Mr Loomer H Kohp ay~~

44245-9
BORN NOV. 22, 05.

Ал Лоуелл Кохпай

Born Oct. 34, 05. 443011

ler on roll.

Record of Deaths among Indians of

Ojaga

Agency

NUMBER ON THIS RECORD.	NUMBER ON RECORD OF BIRTHS.	NUMBER ON FAMILY REGISTER.	NAME.	AGE.	SEX.	DATE OF DEATH.	MARRIED, SINGLE, WIDOW, WIDOWER, OR DIVORCED.	NAME OF A LIVING RELATIVE.	RELATION.	NUMBER OF RELATIVE ON FAMILY REGISTER.
212	316		Ma se	$\frac{3}{12}$	F	July 7/05	Single	Annie Pann	Mother	109
213		1052	Bennison, Carrie E	9	F	Aug 5/05	"	Eliza Bennison	"	1049
214	303		Ellen E. Tayler	$\frac{5}{12}$	F	June 27/05	"	James E. Tayler	Brother	1097
215	304		Ma shah-tsu	$\frac{7}{12}$	M	Dec 14/05	"	Richard Neate	Father	"
216	344		Ma shah-tsu	$\frac{4}{12}$	M	Nov 20/05	"	Daniel West-	"	77
217		221	William Stephens	23	M	Nov 30/05	"	George Big heart	Uncle	771
218		357	Ma shah-tsu	4	F	Nov 12/05	"	Ma Linn Hall	Mother	356
219	288		E wale sah	1	M	Oct-1/05	"	Ma wale sah	Father	379
220			Tah-tsu-ho-grad	3	M	Oct-15/05	"	"	"	379
221	360		Annie Pann	14	F	Oct-11/05	"	Ma wale sah	"	393
222	289		Marguerite	$\frac{9}{12}$	F	Sept-15/05	"	Marguerite Bump	"	418
223	246		Roscoe W. Payer	1	M	Oct-12/05	"	Wm Payer	"	471
224	556	556	Nora Lookout	17	F	Nov 14/05	"	Fred Lookout	"	554

215	620	He me me me	59 F	Dec 3/05	Widow	John McFull	Son	594
226	628	Hale Hale more Hale	27 M	Oct 23/05	Single	Elizabeth	Father	692
227	694	Stone Hale Hale	56 F	Dec 10/05	Wife	Wm Potts	Son	757
228	756	Mo se che	47 F	Dec 8/05	"	Myrtle Starnidge	Son	1220
229	1219	Julia Starnidge	1 M	Nov 25/05	Son	James Starnidge	Son	1147
230	234	Ben Starnidge	46 F	Nov 12/05	Wife	John Pappan	Wife	1447
231	1448	Lucie Pappan	2 F	Nov 7/05	Son	Frances Reed	Father	1552
232	210	Viola L. Reed	31 M	Nov 15/05	Married	George Scott	Brother	1687
233	1648	Harley Scott	1/2 F	Nov 10/05	Single	Amos Dwyer	Father	121
234	355	He the top of	34 M	Dec 5/05	"	Wale to see me	Mother	333
235	364	Chloe to Hale in Hale	15 F	Jan 12/06	"	McLennan	Father	1571
236	155	Ene of pe	21 M	Jan 25/06	"	Wale to see me	Mother	179
237	180	John Stal	1 F	Dec 22/05	"	Emmery Gibson	Father	238
238	221	Mary Gibson	36	"	"	Widow	"	"
239	570	Wale Hale the Hale	22 M	Feb 21/06	"	Hale Hale	Charles	88
240	299	Waller Glover	5/12 M	Nov 19/05	"	Amos Hamilton	Father	408
241	588	Trinidad Hamilton	22 F	Feb 21/06	Married	Hamilton to Hale	Cousin	725
242	600	Mary to see me	3 M	Dec 25/05	Married	Harley Starnidge	"	610
243	366	Benjamin Starnidge	1/2 M	Feb 25/06	Single	Charles May	Father	673
244	758	Karl May	68 F	Jan 25/06	Widow	Ben G. West	Son	820
		Hale to me						

9

5-323 b.-Form 2.

ANNUITY PAY

6-62

ANNUTTY PAY

NO.

LAST. PRESENT.

NAMES.

AGE.

SEX.

PER CAPITA.

AMOUNT PAID.

MARKS AND ST.

AMOUNT BROUGHT FORWARD.

15705 00

364 358 Kah-wah-he-tsa (Sas-sa-moie) Head 58 M. 45 00

5 9 Wah-ko-ki-he-kah Wife 40 F. 45

6 60 Wah-to-sah-grah " 38 F. 45

9 1 Ah-kah-mo-tsa-he Daut 15 F. 45

70 2 Lah-su-su-pah Son 15 M. 45

1 3 Ah-kah " 12 M. 45

2 4 Tah-tsa-hu-hah " 10 M. 45

3 5 Wah-hu-sah Daut 6 F. 45

4

367 366 *Josephine McKinley Head 18 F. 45 560 00 Kah-wah-he-tsa,

376 367 Ne-wai-la (Tsa-shin-kah) Head 40 M. 45 45 00 ✓ Josephine

7 8 Ne-tsa-he Wife 30 F. 45

8 9 Kil-an-to-mo Daut 3 F. 45

380 370 Son-se-gra Head 39 F. 45 135 00 Ne-wai-la, his X

381 371 Wah-ko-ki-he-kah Head 52 F. 45 45 00 Son-se-gra, her

383 372 Wah-tsa-moie Son 14 M. 45

4 3 Wah-koh-sah-moie Daut 10 F. 45

387 374 *Magdeline Hunter Head 18 F. 45 135 00 Wah-ko-ki-he-k

45 00 Magdeline

BLACK DOG BAND.

385 375 Black Dog Head 59 M. 45

6 6 Gra-to-me-tsa-he Wife 26 F. 45 30 00 Black Dog, his X

387 377 Edgar McCarthy Head 33 M. 45

8 8 Me-tsa-he Wife 25 F. 45 90 00 Edgar M

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ROLL.

SIGNATURES.	SIGNATURES OF WITNESSES.	DATE OF RECEIPT.	REMARKS.
-------------	--------------------------	------------------	----------

his mark	Stu Loomer St Kohpay		470881-2
Mr. Finley	Stu Loomer St Kohpay		470907

mark	Stu Loomer St Kohpay	MAR 5 1906	398743
(mark)	Stu Loomer St Kohpay	MAR 7 1906	470763

her mark	Stu Loomer St Kohpay		470874
& Hunter	Stu Loomer St Kohpay		470875

mark	Stu Loomer St Kohpay	MAR 6 1906	470672
cently	Stu Loomer St Kohpay	MAR 7 1906	470776

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389	379	To-wah-e-he	Head	32	M.	45	90 00	To-wah-e-he, his X mark
390	380	Moh-shah-hah-me	Wife	68	F.	45		
391	381	Amos Hamilton	Head	54	M.	45	135 00	Amos Hamilton
392	382	Noah Hamilton	Son	4	M.	45		
393	383	Ira	"	2	M.	45		
1907	48	*Timothy	"	5/12	M.	45		
394	384	Gra-tah-mo-tah-hah	Head	26	P.	45	180	Gra-tah-mo-tah-hah, her X
395	385	Wah-tah-a-tah	Son	11	M.	45		
396	386	Mah-sah	"	8	M.	45		
397	387	He-ah-to-me	Daut	7	F.	45		
398	388	Me-ho-e	Head	67	P.	45	45 00	Me-ho-e, her X mark
399	389	Allison Webb	Head	22	M.	45	45 00	Allison Webb
400	391	He-lo-ki-he	Head	39	M.	45	90 00	He-lo-ki-he, his X mark
401	392	E-gre-tah	Son	16	M.	45		
402	393	Myron Bangs	Head	25	M.	45	90 00	Myron Bangs
403	394	Wah-sop-py	Wife	32	F.	45		
404	395	Silas Sanford	Head	29	M.	45	90 00	Silas Sanford
405	396	Anna Sanford	Wife	24	F.	45		
407	397	Allen Webb	Head	26	M.	45	135 00	Allen Webb
408	398	Hum-pah-to-kah	Wife	18	F.	45		
409	399	Gra-tah-seah	Son	8	M.	45	45 00	Willie McCarthy
410	400	Willie McCarthy	Head	25	M.	45		
412	401	Andrew Jackson	Head	37	M.	45	135 00	Andrew Jackson
413	402	Wah-hrah-lua-pah	Wife	52	F.	45		
414	403	Me-tea-he	Daut	12	F.	45		

363 enrolled with 273 as husband.

*367 Indian name on last roll Hum-kah-me

*382 " " " " " Wah-to-sah

*374 died Oct. 18. 1905

*375 " " 1 "

404 " Sep. 15 "

379 " Oct. 11 "

411 enrolled with 802 last as wife

AMOUNT CARRIED FORWARD.

17730 00

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X mark

Still Loomer HKohpay

MAR 6 1906 470598

Hamilton Still Loomer HKohpay

470942-57
* died Nov. 19, 1905

her X mark

Still Loomer HKohpay

MAR 6 1906 470636

Still Loomer HKohpay

MAR 5 1906 398707

Webb

Still Loomer HKohpay

MAR 6 1906 470654

X mark

Still Loomer HKohpay

MAR 7 1906 470739

Langs. Still Loomer HKohpay

MAR 7 1906 470764

ford Still Loomer HKohpay

MAR 7 1906 470792

Still Loomer HKohpay

MAR 5 1906 398708

Barthly. Still Loomer HKohpay

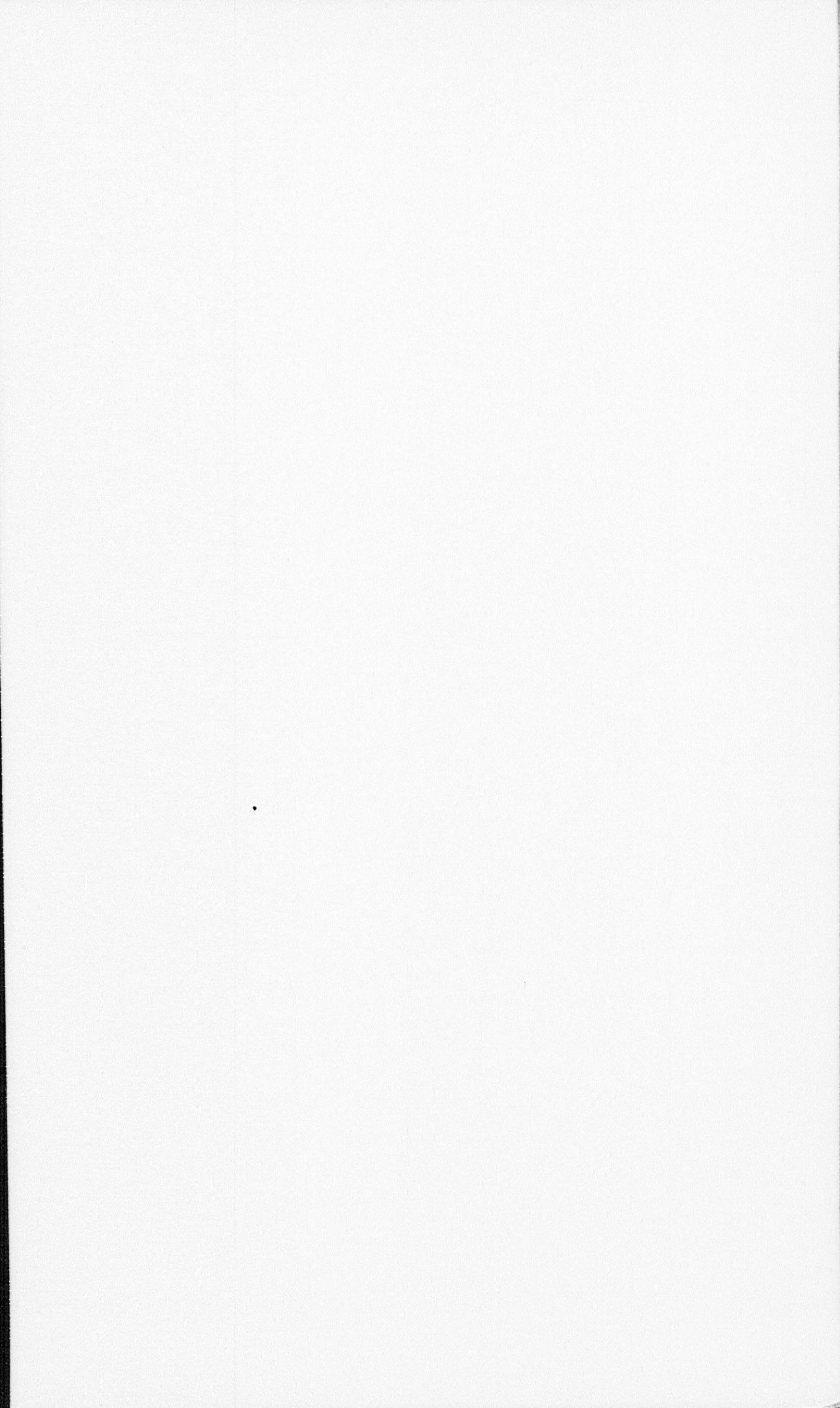
MAR 5 1906 398697

Clear Still Loomer HKohpay

MAR 5 1906 398724

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agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll, on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof. * * *

It then, after providing that names placed on the roll by fraud may be eliminated therefrom and prescribing the method of procedure, declares "and the said roll as above provided, after 137 the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe."

The questions submitted as formulated by the Indian Office are as follows:

"Are the persons whose names are on the roll of January 1, 1906, but who died previous to that time, or who may die before making the final selection, entitled to allotments, and to a pro rata share of the tribal funds?"

"Are the children who are born between January 1, 1906, and July 1, 1907, but who die before a selection is made for them, entitled to share in the divisions of the tribal lands and funds?"

January 1, 1906, is the important date in this legislation. It is clearly intended that all members of the tribe in being on that day shall share in the distribution of the tribal property. The lands and funds of the tribe were communal property in which no individual held a separate interest or one that would descend at his death to his heirs. By death the interest of the individual in the tribal property terminated. Only those living January 1, 1906, had any interest therein that day. None could claim any interest by inheritance but held alone by virtue of his personal right of membership in the tribe. The membership of the tribe as it was constituted January 1, 1906, must be treated as the thing had in view by the law. An individual who died before that date was not then a member of the tribe and for the purposes of division of the tribal property under this act it must be considered that his name was erased from the tribal roll at the time of his death.

138 Under this law the right of each member to his share of the tribal property became fixed as of January 1, 1906, and thenceforward he held such interest in his individual capacity and not as a member of the community. His death thereafter did not destroy this interest but it descended to his heirs. That this effect was intended is clearly evidenced by other provisions of the law. By section four all funds of the tribe are to be held in trust by the United States for the period of twenty-five years from January 1, 1907, to be segregated as soon after said January 1, 1907, as may be practicable "and placed to the credit of the individual members of the said Osage Tribe on a basis of a *pro rate* division among

the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided." By section five it is provided that at the expiration of twenty-five years from January 1, 1907, the lands, mineral interests, and money thus held in trust" shall become the absolute property of the individual members of the Osage Tribe, according to the roll herein provided for or their heirs as herein provided." Section six prescribes a rule of inheritance as follows:

"That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

Allotments should be made to or for all members of said tribe living January 1, 1906, the portion of any who may die after that date going to their heirs.

139 If no provision had been made for the children born to members after January 1, 1906, they would have been excluded from participation in the division of the tribal property. But such children born prior to July 1, 1907, are to be recognized as members of the tribe for the purposes of this division. The mere fact of birth between the dates mentioned fixes their status. Immediately upon birth such a child becomes invested with an interest in the tribal property. This interest, like that of other members, after January 1, 1906, is held in his individual capacity. Death before identification of the particular tracts of land comprising that interest does not destroy the interest but only casts it upon his heirs.

My conclusions upon the questions submitted may be summarized as follows:

Persons who died prior to January 1, 1906, are not entitled to allotments. Members of the tribe living January 1, 1906, become, as of that date, entitled to allotments and their death subsequently thereto does not destroy that right which then vests in their heirs. Children born to members of the tribe between January 1, 1906, and July 1, 1907, become, by virtue of such birth, entitled to allotments, and death prior to actual selection does not destroy the right but casts it upon the heirs.

The papers submitted are herewith returned.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved:

THOS. RYAN,
Acting Secretary.

AUGUST 10, 1906.

152

Demurrer

Filed September 24, 1934

* * * * *

Come now the plaintiffs named in the above-entitled cause by their attorneys, Webster Ballinger and Thomas L. Sloan, and say that defendant's answer is bad in substance.

WEBSTER BALLINGER,
THOMAS L. SLOAN,
Attorneys for Plaintiffs.

QUESTIONS OF LAW RAISED BY DEMURRER

1. The roll of December 12, 1905, was confirmed by the act of June 28, 1906, and was final except as to names the Secretary was authorized to strike therefrom on the ground of fraud, which latter is not here in issue.

2. The act of June 28, 1906, conferred authority only upon the Secretary to add names to the confirmed roll, and to strike names from the confirmed roll within the limitations therein declared.

3. The roll approved by the Secretary, April 11, 1908 (defendant's ex. A), was final only as to names of persons shown thereon and found by the Secretary to be entitled to be added to the confirmed roll.

4. The roll of December 12, 1905, contained the name of Timothy Hamilton, and the continuation of said name on said roll was in nowise dependent upon said enrollee being alive on January 1, 1906.

5. That if the continuation of the name of Timothy Hamilton on said roll was dependent upon said enrollee being alive on January 1, 1906, the Secretary could not lawfully strike said name from said roll without an affirmative finding first made, after hearing with notice to plaintiffs and opportunity afforded them to be heard, that Timothy Hamilton died prior to January 1, 1906.

6. That there is no averment in the answer that exhibits D and G, attached thereto, were made or kept pursuant to any law, departmental regulation, or departmental instruction, or that said paper writings constituted any part of records of the United States in the office of the United States Indian agent at the Osage Agency on January 1, 1906; that said paper writings show on their face that they are inadmissible and cannot be considered as evidence for any purpose.

153 7. That there is no averment in the answer explaining the notations and alterations appearing on the face of defendant's exhibits E, F, and H without which explanation said exhibits are inadmissible and cannot be considered as evidence for any purpose; further there is no averment in the answer that said paper writings formed any part of the records of the United States in the office of the United States Indian agent at the Osage Agency on January 1, 1906.

8. That defendant's exhibits B and C as appears on their face rest solely upon defendant's exhibits D, E, F, G, and H, which are with-

out evidentiary value, and the consideration of said exhibits as factual basis for said two decisions was improper, arbitrary, and capricious.

9. That the act of June 28, 1906, confirmed the name of Timothy Hamilton on the final roll of the Osage Tribe of Indians, and by express provision imposed upon the Secretary the ministerial duty to pay Timothy Hamilton, during his life, a per capita distributive share in all future money payments made the Osage Indians, and upon his death to pay said per capita share to plaintiffs in equal parts.

Order of substitution

Filed November 27, 1934

* * * * *

Upon consideration of the suggestion of Webster Ballinger, attorney for the plaintiffs in the above-entitled cause, herein filed on the 21st day of November 1934, it is by the court this 27th day of November 1934,

Ordered, that A. B. Pattison, administrator of the estate of Amos Hamilton, deceased, be, and he is hereby, substituted as party plaintiff in this cause for Amos Hamilton, deceased.

By the court:

PEYTON GORDON,
Justice.

No objection:

WILLIAM H. HASTIE,
Attorney for Defendant.

154 *Order for writ of mandamus to issue and appeal noted*

Filed November 27, 1934

* * * * *

Come now here as well the relators, as the respondent, by their respective attorneys.

Whereupon the relators demurred to the answer of the respondent having been sustained on the 16th day of November 1934, the respondent by his attorney says he will stand upon his answer.

Thereupon, the court being fully advised, it is considered, ordered and adjudged that the respondent, Harold L. Ickes, be, and he is hereby, commanded within twenty days after this date to recognize the name of relators' son, Timothy Hamilton, as now, and at all times heretofore, on the final roll of the Osage Tribe of Indians confirmed by the act of June 28, 1906 (34 Stats. at L. 539).

The respondent thereupon in open court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this court to the United States Court of Appeals for the District of Columbia, and pending such appeal the judgment is stayed and no writ shall issue thereon against the respondent.

PEYTON GORDON,
Justice.

Nov. 27, 1934.

Assignment of errors

Filed December 5, 1934

* * * * *

Now comes the defendant Harold L. Ickes, Secretary of the Interior, by his attorneys, and assigns as errors of the Supreme Court of the District of Columbia in the above-entitled cause the following:

1. The court erred in sustaining the demurrer of the plaintiffs;
2. The court erred in signing and entering the final order directing that a writ of mandamus issue;
3. The court erred in holding in effect that the death of Timothy Hamilton before January 1, 1906, did not prevent him from acquiring rights of tribal membership under the act of June 28, 1906;
4. The court erred in not overruling the demurrer and dismissing the petition of the plaintiffs for lack of jurisdiction;
5. The court erred in not overruling the demurrer and dismissing the petition of the plaintiffs for absence of necessary parties.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,

WILLIAM H. HASTIE,
Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.

Service of a copy of the above assignment of errors acknowledged this 5th day of December 1934.

WEBSTER BALLINGER (per H.),
Attorney for Plaintiffs.

Designation of Record

Filed December 5, 1934

* * * * *

The court will please prepare a transcript of the record in the above-entitled cause and include therein the following:

1. Petition for writ of mandamus;
2. Rule to show cause;
3. Motion to amend petition and order granting the said motion;
4. Return to rule and answer to petition;
5. Demurrer to return and answer;
6. Order for substitution of party, plaintiff;
7. Final order of court with notice of appeal therefrom;

- 156 8. Assignment of errors;
9. This designation.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
WILLIAM H. HASTIE,
Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.

Service of a copy of the above designation of record acknowledged this 5th day of December 1934.

WEBSTER BALLINGER (per H.),
Attorney for Plaintiffs.

157 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 156, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 84367 at Law, wherein United States ex rel. Amos Hamilton and Marie Hamilton are plaintiffs and Harold L. Ickes, Secretary of the Department of the Interior of the United States, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 30th day of January 1935.

[SEAL]

FRANK E. CUNNINGHAM, *Clerk.*

158 United States Court of Appeals for the District of Columbia

January Term, 1935. No. 6406

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT
v.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE OF AMOS HAMILTON,
deceased, and Marie Hamilton, appellees

Designation for printing

Comes now the appellant in the above-entitled cause, by his attorney, and directs the clerk that in the printing of the record in said cause there be omitted pages 21 to 112, inclusive, of the transcript of record as certified and filed, the said pages being a list of names upon a roll of the Osage Tribe of Indians.

Counsel certifies that the matter designated for omission is not essential to the disposition of the appeal and that the printing thereof would be a needless expense.

HAROLD L. ICKES,
Secretary of the Interior, Appellant.
By (S.) NATHAN R. MARGOLD,
Solicitor, Department of the Interior.

I consent to the designated omissions:

By (S.) NATHAN R. MARGOLD,
Attorney for Appellees.

159 In the Court of Appeals of the District of Columbia

January term, 1935

No. 6406

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE OF AMOS HAMILTON,
deceased, and Marie Hamilton, appellees

Stipulation to correct error in the transcript of record

It is stipulated by counsel for the respective parties in the above-entitled cause that the portions of the transcript of record, as prepared by the clerk of the Supreme Court of the District of Columbia, appearing therein as exhibits to the petition for writ of mandamus and designated serially as exhibit A to exhibit I, inclusive, are in fact and appear in the original record as exhibits to the return to rule to show cause and answer to petition for writ of mandamus.

It is further stipulated that the said exhibits, which are pages 13 to 139, inclusive, in the said transcript should follow and be inserted after the page numbered 151 in that transcript.

The clerk is authorized and directed to cause the said exhibits to be inserted in their proper place and order in the printed transcript of record, to wit, after page 151 of the original transcript, and to cause the said exhibits to be listed in the index of said transcript under and as part of the return to rule to show cause and answer to petition for writ of mandamus.

160 The clerk is further authorized and directed to cause this stipulation to be inserted in the said printed record as part thereof.

WILLIAM H. HASTIE,
Assistant Solicitor, Department of the Interior.
Attorney for Appellant.
WEBSTER BALLINGER,
Attorney for Appellees.

Dated: February 27, 1935.

161 6406.

Harold L. Ickes, Secretary of the Department of the Interior of the United States, appellant, vs. A. B. Pattison, administrator of the estate of Amos Hamilton, deceased, and Marie Hamilton.

Stipulation to correct error in transcript of record.

United States Court of Appeals for the District of Columbia. Filed Feb. 28, 1935. Henry H. Hodges, clerk.

(Endorsed:) United States Court of Appeals for the District of Columbia. Filed Feb. 9, 1935. Henry W. Hodges, clerk.

(Endorsement on cover:) District of Columbia Supreme Court. No. 6406. Harold L. Ickes, Secretary of the Department of the Interior of the United States, appellant, vs. A. B. Pattison, Administrator of the Estate of Amos Hamilton, deceased, and Marie Hamilton. United States Court of Appeals for the District of Columbia. Filed Feb. 4, 1935. Henry W. Hodges, clerk.

IN THE
**United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1935

No. 6406

HAROLD ICKES, SECRETARY OF THE DEPARTMENT OF THE
INTERIOR OF THE UNITED STATES, APPELLANT

vs.

UNITED STATES OF AMERICA EX REL. A. B. PATTI-
SON, ADMINISTRATOR OF THE ESTATE OF AMOS HAMIL-
TON AND MARIE HAMILTON, APPELLEES.

APPELLEES' BRIEF.

WEBSTER BALLINGER,
THOMAS L. SLOAN,
Attorneys for Appellees.

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1935

No. 6406

HAROLD ICKES, SECRETARY OF THE DEPARTMENT OF THE
INTERIOR OF THE UNITED STATES, APPELLANT

vs.

UNITED STATES OF AMERICA EX REL. A. B. PATTI-
SON, ADMINISTRATOR OF THE ESTATE OF AMOS HAMIL-
TON AND MARIE HAMILTON, APPELLEES.

APPELLEES' BRIEF.

Statement of the Case.

Appellant and appellee here were defendant and plain-
tiffs, respectively, in the lower court.

From final judgment entered in the lower court com-
manding appellant within twenty days thereafter to recog-
nize the name of Timothy Hamilton "as now, and at all
times heretofore, on the final roll of the Osage Tribe of
Indians confirmed by the Act of June 28, 1906", (R. 34)
appellant appealed. Judgment was entered on demurrer

(R. 33-4) to appellant's answer (R. 10-44) to appellee's petition (R. 1-8).

After decision by the lower court, and prior to entry of judgment, Amos Hamilton, one of the original petitioners, died and A. B. Pattison, administrator of his estate, was substituted (R. 34).

Judgment was entered upon a finding by the lower court (announced orally), in substance as follows:

That the last official roll of the members of the Osage Tribe of Indians made prior to January 1, 1906, was made in the month of December 1905 and superseded all prior rolls; that the name of Timothy Hamilton was lawfully inscribed on that roll; that said roll was on file in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, on the first day of January 1906, and was confirmed by section 1 of the Act of June 28, 1906 (34 Stat. at L., 539: R. 2), being therein "declared to be the roll of said Tribe and to constitute the legal membership thereof".

That appellant, and his predecessors in office, never acquired any jurisdiction over the name of Timothy Hamilton appearing on the confirmed roll, and possessed no power to strike his name from that roll.

That the statute in clear and express language, free from ambiguity or doubt, declared "*the roll*" * * * as *it* existed on the first day of January 1906, * * * to be the roll of said Tribe and to constitute the legal membership thereof, thus making "*the roll*"—not tribal membership—as *it* (the roll) existed January 1, 1906, the sole basis of a property right, and upon death of the enrollee transmitted the property right to the decedent's heirs.

That the statute contained no provision limiting property rights to persons in being on January 1, 1906 and whose names appeared on the confirmed roll, nor did it contain any provision for inquiry into and determination by any person, officer or tribunal of such

a question, for which provision would of necessity have been made had a limitation been intended or contemplated.

That the instructions issued by the Commissioner of Indian Affairs (R. 16) directing the Agent to prepare the roll that bears the Secretary's approval on April 11, 1908, the Agent's certification (R. 19), the letter of the Agent transmitting the roll to the Secretary, and an examination of the roll itself, all exclude the idea that the Department in 1908 construed or interpreted the Act of June 28, 1906, as limiting property rights only to those who were in being on January 1, 1906, and whose names appeared on the confirmed roll.

That the statute so plainly confirmed the roll and directed appellant to accord Timothy, (whose name appeared thereon) or his lawful heirs, a distributive share of the tribal property, that it amounted to a command, and was so far ministerial that its performance could be enforced by mandamus.

Five errors are assigned as a basis for the appeal (R. 35). The first two are general in their nature and state no specific errors. The remaining three state specific questions of law only.

ARGUMENT.

We will hereinafter deal with the questions presented in appellant's brief in the order therein set forth.

I.

The first question presented (Brf., 6) is that—

the lower court had no "judicial jurisdiction to confer rights of tribal membership upon Timothy Hamilton because he is not named upon the final roll of the Osage Tribe approved by the Secretary of the Interior".

The contention here presented is that the Secretary by the Act of June 28, 1906 was given authority to compile and approve a roll of the Osage Tribe of Indians, which roll when so prepared and approved was by the Statute made final and formed the exclusive basis for the distribution of the tribal property (Brf., 7-8). No such question is specifically stated in the assignments of error (R. 35) as required by Section 9 of Rule 5 of this Court. Without waiving this point, we proceed to a consideration of the question and supporting argument.

In considering the question it should be remembered that Congress possesses plenary power over Indian Tribes, the membership thereof, and tribal property, *United States v. Kagama*, 118 U. S. 375; *Choctaw Nation v. United States*, 119 U. S. 1, at 27; *Stephens v. Choctaw Nation*, 174 U. S. 445, at 483; *Lone Wolf v. Hitchcock*, 187 U. S. 553 at 565-7.

The judgment of the lower court went no further than to recognize a right that had, by law of Congress, been confirmed and placed beyond the power of appellant to disregard or ignore. There was no attempt to *confer* a right of tribal membership upon Timothy Hamilton as a review of the record will disclose.

It is conceded by appellant that the name of Timothy Hamilton was lawfully inscribed on a roll of members of the Osage Tribe of Indians made by the authorized agents of the United States in December 1905 (Pet. par. 3, R. 1-2; Ans. par 3. R. 12); that said roll was the last roll made by lawful authority prior to January 1, 1906, and was on file in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, on January 1, 1906 (Pet. par. 5, R. 4: Ans. par. 5, R. 12).

The Act approved June 28, 1906 (34 Stat. 539) (pet. par. 4. R. 2-4) provided:

Section 1.

“That the *roll* of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as *it* existed on the first day of January, 1906, * * *” (with additions conceded by appellant not here material, Brf. p. 19) “is hereby declared to be the roll of said tribe and to constitute the legal membership thereof.”

Authority was then given the Secretary to investigate the rights of certain unenrolled children of parents whose names appeared on said roll and of certain classes therein defined, and determine the right of each such child to enrollment.

The Principal Chief of the Osages was commanded, within three months from June 28, 1906, to file with the Secretary a list of the names “which the tribe claims were placed upon *the roll* by fraud”, but was prohibited from including therein the name “of any person or his descendants” enrolled prior to December 3, 1881. The Secretary was by said section then directed to carefully investigate each name appearing upon the list, if and when filed by the Principal Chief within the time, and determine whether the person was entitled to enrollment, the duty of proving the fraud charged being expressly placed upon the Osage Tribe.

The Secretary was then authorized to place “upon the Osage roll” all persons found by him to be so entitled to enrollment and “to strike from the said roll the names of all said persons or their descendants which he found were placed thereon by or through fraud.”

It is then declared:

“and the *said roll* as above provided, after the revision and *approval* of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the *action* of the Secretary of the Interior *in the revision of the roll as herein provided* shall be final, * * *; and the tribal lands and tribal funds

of said tribe shall be equally divided among the members of said tribe as hereinafter provided." (Italics ours.)

A brief statement of the historical background of the Osage roll may be helpful. In 1905 the roll of the Osage Indians was more complete than the roll of any other tribe. The Osage Indians had been deriving large income from oil, and as stated by counsel for appellant (Brf. 25) from 1890 quarterly payments were made annually to the members of the tribe. This had necessitated the preparation of four rolls each year to be used as a basis for the payments. During the sixteen years prior to January 1, 1906, the Osage roll had been revised approximately sixty-four times, each revision being with the consent and approval of the officials of the tribe who certified to the correctness of each roll. When it came to the preparation of the bill that became the Act of June 28, 1906, as appears on the face of Section 1, objection was made (by the Osage tribal officials) to the Secretary being given any jurisdiction over any name appearing on the roll without their consent being first had and obtained in writing. Congress respected their wishes and so limited the jurisdiction of the Secretary as appears from the express language of the Statute. The legislation was pending before Congress for nearly two years. The first bill introduced confirmed the roll on file January 1, 1905. Delay in its enactment necessitated the introduction of a second bill, which underwent revision as to the effective date of the roll on file and which date was finally fixed as January 1, 1906. The officers of the tribe knew that between the date of the preparation of the last roll and the first day of January, 1906, some deaths of necessity had occurred among those whose names appeared on the roll, and presumably knew the individuals who had died. This was undoubtedly taken into consideration. Any

basis for distribution—whether it be a roll theretofore made, or those members of the tribe living on a certain day—was necessarily arbitrary. To limit rights to persons whose names appeared on the roll and who were in being January 1, 1906, would necessitate a revision of the roll by the Secretary, which they did not want. By adopting the roll on file on January 1, 1906, and making that roll the basis for distribution, no revision was necessary or could be made. The officials of the tribe adopted the latter course and Congress acceded to their wishes as is evidenced by the provision conferring jurisdiction on the Secretary to inquire into only such names appearing on the roll as the tribe requested in writing through its Principal Chief.

Thus the Congress, having plenary power over the roll of the Osage Tribe, in positive language, free from ambiguity or doubt, confirmed “*the roll of the Osage tribe of Indians* * * * as it existed on the first day of January, 1906,” and declared *it*, (with certain additions not here material) “to be the roll of said tribe and to constitute the legal membership thereof.”

In equally express language the acquisition of jurisdiction by the Secretary over any name appearing on the confirmed roll was made dependent solely upon the filing, within three months after June 28, 1906, with the Secretary, and by the Principal Chief, of a complaint in writing charging that the name appearing on the confirmed roll had been placed thereon by fraud. If no such complaint was filed no jurisdiction attached and the Secretary possessed no power to alter or change said roll in any respect whatsoever. It clearly appears from the record that no list was ever filed upon which was inscribed the name of Timothy Hamilton (Pet. par. 6, R. 4; Ans. par. 6, R. 12-13). It further appears with reasonable certainty that no list containing any name was filed by the Principal Chief (Dft.’s Ex. “A”, R. 16 P.)

Thus the Secretary never acquired any jurisdiction over the confirmed roll, or any name appearing thereon, and upon which roll Timothy's name appeared.

The only jurisdiction that attached to the Secretary under the first section of the act, (no list having been filed by the Principal Chief) was jurisdiction to investigate the rights of certain unenrolled children of parents whose names appeared on the confirmed roll and which children were of certain classes specifically defined in said section. Power flows from jurisdiction. If no jurisdiction exists, no power can be exercised. The only power conferred by said section upon the Secretary, and possessed by him, and flowing from the jurisdiction acquired, was the power to determine the right of each such child to have its name added to the confirmed roll, and if found to be so entitled to add the name to the confirmed roll, which is referred to in the statute as "*revision*" of "said roll". The provision appearing in the first section, viz:

and the *said roll* as above provided, after the *revision* and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the *action* of the Secretary of the Interior *in the revision of the roll as herein provided shall be final.*"

of necessity had relation only to the approval by the Secretary of the names to be added to the confirmed roll, and the finality of the Secretary's action in making the additions over which he was given express jurisdiction. This plainly appears from an analysis of the above provision. The words "and the said roll as above provided" related exclusively to the confirmed roll over which he acquired no jurisdiction. The words "after the *revision* and *approval* of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe", related ex-

clusively to the adding of the additional names by the Secretary to the confirmed roll and the approval of the additions by the Secretary over which he was given jurisdiction. This is made plain by the following words: "and the action of the Secretary of the Interior *in the revision of the roll as herein provided shall be final*", meaning that his acts, within the scope of the jurisdiction conferred upon him, should be final. Thus finality attached only to the Secretary's approval of the names added to the confirmed roll and over which he was given jurisdiction. The provision is susceptible of no other construction.

Following the determination by the Secretary of the rights of unenrolled children of the classes defined in section one to have their names added to the confirmed roll and the approval of orders by the Secretary directing the addition of said names to the confirmed roll (there having been no protest filed by the Principal Chief against any name appearing on the confirmed roll) the Acting Commissioner of Indian Affairs directed the United States Indian Agent, Osage Agency, in writing, (Pet. par. 8, R. 5; Ans. par. 8, R. 13 & Dft. Ex. "A", R. 16) to prepare for approval by the Secretary a roll which should consist of—

"(1) the names on the Osage Tribal roll as it existed in your office on the first day of January, 1906; and (2) of the names of all persons, including adults and children, subsequently added thereto by directions of this office with the authority of the Secretary of the Interior in accordance with the provisions of section 1 of the act named".

"The column for remarks in the roll should show the date and file number of the authority for each name added to the roll 'as it existed on the first day of January, nineteen hundred and six'".

"You should properly certify to the correctness of the roll."

The petition alleged, and the answer admitted by failure to deny, that the agent in carrying out the above instructions adopted and used the December 1905 roll as the roll referred to in the Act of June 28, 1906 (Pet. par. 8, R. 5; Ans. par. 8, R. 13). The roll prepared by the agent was attached to defendant's answer as a part of Dft's. Ex. "A" and forms a part of the record in this Court, but only the caption and certificate were included in the printed record (R. 18, 19, 36). In the caption appears an explanatory statement of the roll prepared by the Agent (R. 18) in part as follows:

"On roll 2230.

"*Explanatory.*—Column one shows number adopted by Osage Allotment Commission, column two gives the number on the 1906 annuity roll, the roll first made in the Indian agent's office after January 1, 1906, the third column gives consecutive numbers of this roll, column four gives the names of members as they appear at this date, February 15, 1908, showing relationship, age, and sex as they appear on the agency roll and will appear on the next regular annuity roll".

It is a matter of which this Court will take judicial notice that the roll made by the Osage Allotment Commission—the first roll referred to—was made subsequent to the approval of the Act of June 28, 1906, and as a guide to making the allotments authorized by said act. The 1906 annuity roll—the second roll referred to—as shown by the record (Dft's. Ex. "H", R. 30), was made in March, 1906. The third roll referred to was the roll prepared by the agent pursuant to said instructions, and completed by him February 15, 1908. No roll is referred to in the explanatory statement that was made prior to January 1, 1906, or on file in the office of the agent on that day. All rolls referred to in the explanatory statement were made subsequent to January 1, 1906.

Having thus prepared the roll in disregard of positive instructions, the agent executed and affixed the following certification (R. 19) thereto:

“I hereby certify, on honor, that the foregoing roll
 * * * contains the *names of all persons* on the
 tribal roll of the Osage Indians in Oklahoma as it ex-
 isted on the first day of January, nineteen hundred and
 six, * * * and the names of all persons, * * *
 subsequently added to the Osage tribal roll * * *
 with the authority of the Secretary of the Interior, in
 accordance with the provisions of section 1 of the Act
 of Congress approved June 28, 1906, * * *, known
 as the Osage Allotment Act.” (Italics ours.)

An examination of the roll (on file with the Court but not printed) will disclose that it contains no reference to the omission from this roll of any name appearing on the confirmed roll, nor is any such reference contained in any communication written in connection with the roll.

Timothy Hamilton having died prior to the preparation of the three rolls set out in the caption and used as the basis for the roll prepared by the agent, his name naturally did not appear thereon, and this offers the only explanation for the omission of his name from the roll made by the agent.

The roll so prepared and certified to by the agent was transmitted by letter dated February 15, 1908 (R. 16-17), to the Commissioner of Indian Affairs. All papers transmitted by the Agent were silent as to the omission of Timothy's name from the roll transmitted, but the agent, following his certification, states in his letter to the Commissioner (R. 17):

“This roll has been prepared as instructed and I have faith to believe will be found correct. Since January 1, 1906, I have endeavored to verify the tribal roll at the time of each annuity payment, *and while there*

*has been no change made in the number of persons on the roll, a few changes have been necessary in order to have the names of persons entitled to enrollment appear on the roll properly. * * ** (Italics ours.)

The Commissioner, by letter dated March 9, 1908 (R. 17-18), transmitted the roll to the Secretary for approval of the additions made to the confirmed roll, notation being made in the margin opposite each name added by direction of the Secretary of that fact.

Thereafter and on April 11, 1908, the form of approval affixed to the roll was signed by the Secretary, said form and approval (R. 19) being as follows:

“The foregoing certified roll of members of the Osage Tribe of Indians in Oklahoma, prepared in accordance with the provisions of the Act of Congress of June 28, 1906 (34 Stat. L. 539), embracing the names of 2,230 persons as shown on the foregoing pages, numbered 1 to 93, inclusive, is hereby approved.”

JAMES RUDOLPH GARFIELD,
Secretary.

It thus appears with reasonable certainty that when the Secretary affixed his approval on April 11, 1908, he believed that the roll contained “the names of all persons on the tribal roll of the Osage Indians in Oklahoma as it existed on the first day of January, 1906,” and, realizing his limited jurisdiction and power of approval definitely fixed in the act of June 28, 1906, intended that his approval should relate solely to the names added thereto by his direction.

The confirmed roll, with the additions thereto the Secretary was authorized to make, and did make, was by said act made the exclusive basis for the division of all property, real and personal, then in hand, and that might thereafter

be received, for the account of the Osage Tribe of Indians. Section 2 provides in part:

“First. Each member of said tribe, *as shown by the roll of membership made up as herein provided*, shall be permitted to select one hundred and sixty acres of land as a first selection:” (Italics ours.)

Similarly section 4 provides that all moneys received and to be received for the credit of the Osage Tribe of Indians

“shall be segregated * * * and placed to the credit of the individual members of the Osage Tribe on a basis of a pro rate division among the members of said tribe, *as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided*”. (Italics ours.)

Timothy Hamilton died leaving no issue, nor husband nor wife, and by express provision in section 6 (R. 4) his distributive share passed to appellees.

It is settled law, as stated in *Ballinger v. U. S. ex rel. Frost*, 216 U. S. 240, at 249, and cases therein cited:

“Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motive of the Secretary, he, as all others, is bound by the provisions of congressional legislation.”

Counsel for appellant in their brief (6-10) overlook and ignore the rights asserted by appellees and recognized by the court below. The rights thus asserted are rights conferred upon them by positive law and which appellant was commanded by positive law to recognize and respect, but which he has declined to do. There is no question here pre-

sented involving the exercise of judgment and discretion by appellant, and all the decisions cited by counsel in their brief (pp. 8-10) on this point are without application.

The Act of August 15, 1894 (28 Stat. 305).

Appellant further places reliance in the provision appearing in the latter portion of the first section of the Act of June 28, 1906, viz:

“and the provisions of the Act of Congress of August 15, 1894, * * * granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed so far as the same relate to the Osage Indians.”

as a complete bar to the jurisdiction of the lower court to entertain the petition or afford the relief granted (Brf. 10-11). There is no merit in the contention thus raised as evidenced by prior decisions. The provision in the Act of August 15, 1894, referred to appears in the Indian Appropriation Bill approved August 15, 1894 (28 Stat., 286, at 305), as a separate paragraph and concludes with these words:

“but this provision shall not apply to any land now held by either of the Five Civilized Tribes * * *.”

The Choctaw and Chickasaw Tribes were a part of the Five Civilized Tribes. In 1907 the then Secretary of the Interior, without notice or an opportunity to be heard, struck certain names from the rolls of the Choctaw and Chickasaw Tribes. The persons whose names were thus stricken petitioned the lower court for a writ of mandamus to compel the restoration of their names to the tribal rolls, the case being entitled *Garfield v. U. S. ex rel. Goldsby*. The court below granted the writ, which action was affirmed by this court on appeal (30 App. D. C. 177) and on

further appeal by the United States Supreme Court (211 U. S. 249). The Act of August 15, 1894 permitted persons of Indian blood who had been denied claimed rights to allotments of land to bring suits in the U. S. circuit court in which the land was located, and conferred jurisdiction upon the circuit courts to hear and determine the right asserted and which the Secretary of the Interior had theretofore, or might thereafter, in the exercise of his judgment and discretion deny a person of Indian blood. No such question is here presented. The Secretary was given no jurisdiction over Timothy's name as it appeared on the confirmed roll, and possessed no power to exercise any judgment or discretion as to whether said name should continue on said roll. This is a case in which the Secretary has attempted to exercise jurisdiction and power he did not possess.

It is next contended by counsel for appellant (Brf. 12-13, raised by the fifth assignment, R. 35, Claimed Absence of Necessary Parties) that to require appellant to respect the judgment of the lower court would diminish the shares in the tribal property of those who have been heretofore recognized as alone constituting the membership of the tribe, which should not be done in a proceeding to which all persons whose rights are so affected are not made parties. The answer to this objection is found in the plenary power of Congress over the Osage Tribe, its membership, and their property rights. Congress has spoken in unmistakable terms, and its orders are binding alike upon appellant and all the enrolled members of the Osage Tribe. Appellant, as the responsible governmental officer has failed or refused to execute the congressional mandate, and is the only necessary party defendant. The enrolled members of the tribe have no power to execute the congressional mandate and are wholly unnecessary parties to this proceeding.

II.

The next claimed error presented in appellant's brief (p. 13) is,

"The writ of mandamus issued in this case unlawfully controls and reverses decisions of the appellant and of a former Secretary of the Interior in a matter requiring the exercise of judgment and discretion in the determination of questions of law and of fact".

which is evidently intended to embrace assignments of error one, two, three and four (R. 35).

The record before the Court discloses that the judgment entered in the lower court directed appellant "to recognize" Timothy's name, "as now and at all times heretofore on the final roll of the Osage Tribe of Indians confirmed by the Act of June 28, 1906", which appellant had refused to do, the basis for his refusal being set out in two departmental decisions rendered September 15, 1933 (R. 20-1) and May 18, 1934 (R. 21-4). It was therein held,

1. That the Secretary was given exclusive power by the Act of June 28, 1906 to make and approve a final roll of the Osage Indians; that he made such a roll and affixed his approval thereto on April 11, 1908, which roll became and has ever since remained final (R. 20).
2. That the Act of June 28, 1906 entitled only those persons in being on January 1, 1906 and whose names appeared on the roll on file in the Agency office on January 1, 1906 (with certain exceptions not material here) to enrollment (R. 23-4).
3. That the Agency records indicate that Timothy died in November 1905 and his name was accordingly omitted from the final roll made and approved by the Secretary (R. 20).

The lower court rejected the grounds thus stated as the basis for appellant's refusal, and held in substance (*supra*, pp. 2-3), as orally announced from the bench—

That the statute in clear and express language, free from ambiguity or doubt, declared "*the roll* * * * as it existed on the first day of January 1906, * * * to be the roll of said Tribe and to constitute the legal membership thereof", thus making "*the roll*"—not tribal membership—as *it* (the roll) existed January 1, 1906, the sole basis of a property right, and upon death of the enrollee transmitted the property right to the decedent's heirs.

That the statute contained no provision limiting property rights to persons in being January 1, 1906 and whose names appeared on the confirmed roll, nor did it contain any provision for inquiry into and determination by any person, officer or tribunal of such a question, for which provision would of necessity have been made had a limitation been intended or contemplated.

That the instructions issued by the Commissioner of Indian Affairs (R. 16) directing the Agent to prepare the roll that bears the Secretary's approval on April 11, 1908, the Agent's certification (R. 19), the letter of the Agent transmitting the roll to the Secretary, and an examination of the roll itself, all exclude the idea that the Department in 1908 construed or interpreted the Act of June 28, 1906, as limiting property rights only to those who were in being on January 1, 1906, and whose names appeared on the confirmed roll.

That the statute so plainly confirmed the roll and directed appellant to accord Timothy, (whose name appeared thereon) or his lawful heirs, a distributive share of the tribal property, that it amounted to a command, and was so far ministerial that its performance could be enforced by mandamus.

Counsel for appellees submit that the ruling of the lower court is free from error and should be sustained.

The first basic ground set out in the departmental decision to support the conclusion therein reached has hereinbefore been fully considered (*supra* I, pp. 3-14) and need not be here repeated.

The second basic ground is equally fallacious. It rests upon the claim (R. 23) that the Act of June 28, 1906 had relation back to January 1, 1906, for the purpose of establishing and definitely fixing tribal membership as of that date; that prior to the latter date the lands and funds of the Osage Tribe belonged to the Tribe as a community; that the rights of each individual to participate in the enjoyment of the tribal property depended upon tribal membership, which commenced with birth and terminated with death, and that death, prior to January 1, 1906, of any person whose name was on the roll on file in the agency office that day, automatically removed the name from the roll. From this premises the conclusion is drawn that Timothy's name did not in contemplation of law appear on the roll as it existed on January 1, 1906. If the premises are wrong the conclusion falls. The premises for the conclusion are in direct conflict with the express provision of the statute, which confirmed the roll on file January 1, 1906 and "declared it to be the roll of said Tribe and to constitute the legal membership thereof". By this declaration Congress forever closed the roll to all inquiry, prior to January 1, 1906, into the status—tribal or otherwise, living or dead—of every person whose name appeared thereon (except for one cause not here material) and in express language appearing in sections 4 and 6 directed the distribution of the property among the persons whose names appeared thereon, or their lawful heirs. Congress had knowledge of the tribal custom that had theretofore prevailed, and knew that in the natural course of events some deaths had occurred among so large a number of persons between

the date when the roll was completed and January 1, 1906. If it had been intended to eliminate from the confirmed roll the names of all persons appearing thereon who had died prior to January 1, 1906 some provision for the ascertainment and determination of those who had died prior to January 1, 1906 by some person, official or tribunal would have been included. The absence of such provision indicates with reasonable certainty that it was designedly omitted and that Congress intended what the plain text of statute declares—that the roll should be final.

That Congress, when it so intended, limited in express language rights of enrollment and to shares in tribal property to persons in being on a day certain, and made suitable provision for the ascertainment of the fact appears from the following Acts substantially contemporaneous with the Act of June 28, 1906 under consideration:

Act of June 2, 1900 (31 Stat., 250) limiting rights to enrollment and distributive shares in the property of the Seminole Indians to persons “living on the 31st day of December, 1899”.

Act of June 30, 1902 (32 Stat., 500, Sec. 7 at 501), limiting rights to enrollment and distributive shares in the property of the Creek Tribe to persons “living on May 25, 1901”.

Act of July 1, 1902 (32 Stat., 641, Sec. 28 at 656), limiting rights to enrollment and distributive shares of the property of the Choctaw and Chickasaw Tribes to persons “living on the date of the final ratification of this agreement”.

Act of July 1, 1902 (32 Stat., 716, Sec. 25 at 720), limiting rights to enrollment and distributive shares in the property of the Cherokee Tribe to “persons living on September 1, 1902”.

Act of March 3, 1905 (33 Stat., 1048, at 1071), authorizing the addition to the Choctaw and Chickasaw Tribal

rolls of the names of all children born subsequent to September 25, 1902, and prior to March 4, 1905, and "living on the latter date"; authorizing the addition to the Creek Tribal rolls of all children born subsequent to May 25, 1901, and prior to March 4, 1905, and "living on the latter date"; authorizing the addition to the Seminole Tribal rolls of the names of all children born prior to March 4, 1905 and "living on that date."

Act of April 26, 1906 (34 Stat., 137), authorizing the enrollment of all children born to members of the Choctaw, Chickasaw, Cherokee, and Creek Tribes prior to March 4, 1906, and who were "living March 4, 1906".

Each of the above enumerated Acts expressly authorized the Commission to the Five Civilized Tribes and the Secretary to determine the question as to whether the applicant was alive or dead on the effective date. For the reasons hereinbefore stated (*supra* I, pp. 6-14) the roll of the Osages on file on the effective date was adopted and made final with certain exceptions hereinbefore pointed out.

In *Kenny v. Miles*, 250 U. S. 58 an heirship case arising under the Act of June 28, 1906 the Court in its decision reviewed section by section the Act of June 28, 1906 and at page 61 said:

"By its first section the Act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material here, the authentic roll of the members for the purposes of the Act".

And at page 63 the Court further says:

"The Act of 1906 makes it plain that all whose names were on the authentic roll were to share in the division of the tribal property. They were the 'members' among whom the lands were to be allotted in stated portions. * * *

"Under the Act of 1906 the death of a member entitled to an allotment does not extinguish his right.

According to the implication of the Act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allottee, and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members”.

It is settled law that where the duty in a particular situation is so plainly prescribed by statute as to be free from doubt and equal to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, *Wilbur v. U. S. ex rel. Kadrie*, 281 U. S. at 218-19; *Garfield v. U. S. ex rel. Goldsby*, 211 U. S. at 261. This rule of law governs the decision of this case.

We submit that the text of the statute, as held by the Court below, so plainly excluded any jurisdiction of the Secretary over the confirmed roll, and so plainly required him to accord appellees a distributive share of the property, that it was not open to construction by appellant or his predecessors in office, whose duties thereunder required only compliance with its plain provisions and which were ministerial in their nature.

The court below found it unnecessary to consider the third basic ground underlying the departmental decisions, in which we concur, but as counsel for appellant lays great stress upon this point in their brief it cannot be ignored. It is alleged in the petition (par. 9, R. 5-6) that no inquiry was made at the time of the preparation of the roll bearing the approval of the Secretary dated April 11, 1908, into the time of the birth or death of Timothy of which petitioners had any notice, and that if the date of his birth or death was in anywise determinative of his property rights, petitioners, as his mother and father, were entitled to notice and an opportunity to be heard. Defendant in his answer (pars. 9, R. 13) admits that no such notice was

given or opportunity to be heard afforded and says that neither was required by law. The answer admits by failure to deny (Pet. Par. 13, R. 7; Ans. par. 13, R. 14) that there was no record in the agency on January 1, 1906, "kept or maintained pursuant to any law of Congress or any departmental regulation" that contained any entry of Timothy's death prior to January 1, 1906. It is alleged that there were certain "official" records kept, and that they form the sole basis for the determination in the departmental decisions (R. 20-4) that Timothy died in November 1905. The records upon which the departmental decisions are based are described in defendant's answer (par. 3, R. 12), and copies thereof appear in the record. We will now examine these so-called official records:

The first document referred to is defendant's exhibit "D" appearing in the record between pages 24 and 25. This document is entitled "Record of Births Among the Indians of the Osage Agency". On the seventh line from the bottom appears Timothy's name. To the right of the name and under the column headed "date of birth" appears the following: "Oct. 20/05". The third entry above and in the same column is "Dec. 3/05". The entries were evidently made in consecutive order, and it appears therefrom with reasonable certainty that the entry made opposite Timothy's name was made after Dec. 3, 1905. There is nothing to indicate how soon after Dec. 3, 1905, the entry appearing opposite Timothy's name was in fact made. This record was not made or kept pursuant to any law or departmental regulation, and was evidently kept for the convenience of the Agent and not as an official record.

The second record is defendant's Ex. "E" entitled "Council Proceedings" (R. 24-9). The resolution (R. 25) recites:

"We, the undersigned members of the Osage Council or business committee, in meeting assembled this

4th day of December 1905, for the purpose of considering applications for the enrollment of Osage children born to Osage parents, having passed upon said applications, find the following children entitled to enrollment and respectfully request that their names be placed on the December 1905 annuity roll, as per the following schedule, *showing the number of the head of family, name of parent, name of child, sex, and date of birth*”:

Then follow columns with headings showing “Number of the head of family, Name of parent, Name of child, Sex, and Date of Birth”. In the eighth line from the top under the heading “Name of child” appears Timothy’s name and under the heading “Date of birth” appears the following “Oct. 20, 1905”. It will be observed that this resolution does not purport to show any “date of death”. Opposite Timothy’s name appears the figure “3”, and at the bottom of the roll appears this notation “3 Died Nov. 20, 1905”. It is claimed by appellant that this notation indicated with certainty that Timothy died Nov. 20, 1905, and that he was dead when the resolution was adopted. The resolution refers to him as a “child entitled to enrollment”, and the natural presumption is that he was a living child. As the resolution did not purport to set out anything with reference to death, it cannot be considered as even tending to establish anything more than is recited on its face. There is nothing to indicate that this record was in the Agency on the effective date.

The third record is defendant’s Ex. “F”—“The Annuity Pay Roll of December 1905”. On this record opposite No. 1967 appears Timothy’s name. In the column under the heading “Age” appears “2/12”, thus indicating that on December 12, 1905 Timothy was two months old. Under the heading “Remarks” and opposite Timothy’s name appears the notation in typewriting “born Oct. 20, 1905”.

There is no notation of any kind on this roll indicating Timothy's death or the time thereof.

The fourth record is defendant's Ex. "G"—"Records of Deaths Among Indians of Osage Agency" (R. 30, second Ex.). As deaths were reported they purport to have been entered in successive order in this record. Opposite No. 240 appears the name of Timothy Hamilton. In the column headed "Age" and opposite his name appears the following notation: "5/12", indicating that he was five months old. In the column under the heading "Date of Death" and opposite his name appears the following notation: "Nov. 19, 1905". Immediately above the name of Timothy Hamilton appears the name of Walter Florar, and opposite his name and in the column headed "Date of Death" appears "Feb. 21, '06", indicating that Walter Florar died Feb. 21, 1906. As the entries were made as deaths were reported the only natural inference is that Timothy's death was not reported until sometime after Feb. 21, 1906. If the agent had been present at the time of Timothy's death, or had obtained information thereof prior to Feb. 21, 1906 it is reasonable to presume that he would have made an entry in the record prior to that date. This record was not made nor kept pursuant to any law of Congress nor departmental regulation, and Timothy's name could not have been enscribed thereon on the first day of January 1906, as the entry was not made until sometime after Feb. 21, 1906.

The fifth record referred to is defendant's Ex. "H"—"The Annuity Pay Roll Made in March 1906" (R. 30 3rd Ex.). This could have formed no part of the records on file in the agency on January 1, 1906. Opposite No. 1967 appears the name of Timothy Hamilton. Opposite his name in the column headed "Age" appears the following: "5/12", thus indicating that he was five months old. Op-

posite his name and in the column under the heading "Remarks" appears this notation "Died Nov. 19, 1905". The notation is not in the same handwriting as the other portions of the roll, and no one knows who made it, by what authority, upon what knowledge or when it was made.

It thus appears that not a single alleged record upon which appellant places sole reliance for his conclusion that Timothy died prior to January 1, 1906 was made or kept pursuant to any law or departmental regulation requiring the making and keeping of a record as a muniment of a right. At best the alleged records portray merely incidental recitals based on hearsay, and have no evidentiary value. In *Hegler v. Faulkner*, 153 U. S. 107 at 118-19, the Court in considering the evidentiary value of a similar record said:

"No provision was made in either the Act of Congress or the rules and regulations of the Indian department, to preserve the list as a muniment of title, much less as a public record admissible to prove merely incidental recitals based on hearsay. Such a list does not come within the rule which permits, for some purposes, the use of 'official registers or records kept by persons in public office, to write down particular transactions occurring in the course of their public duties or under their particular observation'. (I Greenl. Ev. 483.) It must be remembered that official registers are not in general evidence of any fact nor required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, as parish register is evidence only of the time of a marriage and of its celebration de facto, for these are the only facts necessarily within the knowledge of the party making the entry. So a register of baptism, taken by itself, is evidence only of that fact. Neither is the mention of the child's age in the register of christenings proof of the day of its birth, to support a plea of infancy (I Greenl. Ev. 493).

“In *Mutual Ben. L. Ins. Co. v. Tisdale*, 91 U. S. 238 (23:314), where the right of action depended on the death of a third person, it was held that letters of administration upon the estate of such person granted by the proper probate court, in a proceeding to which the defendant was a stranger, afforded no legal evidence of such death; and it was said: ‘The only ground for the admission of the letters of administration is, that granting them is a judicial act; but a judgment is not evidence of any matter to be inferred by argument therefrom, or which comes collaterally in question, or is incidentally cognizable’—citing the *Duchess of Kingston’s Case*, 20 How. St. Tr. 355, and many others.

“In *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593 (24:294), it was held that an entry in the minute book of a lodge of Odd Fellows, of which the deceased was a member, made prior to the issue of a policy, and showing his age as recorded by the Secretary of the lodge in the usual manner of keeping its records, was not admissible as evidence of such age.

“We do not deem it necessary to discuss this question at greater length. Our conclusion is that the court below did not err in excluding the list offered. It was not an official record, intended as a mode of preserving the recollection of facts, nor was it based upon the personal knowledge of the party making the entry. It was mere hearsay.”

It therefore affirmatively appears that the refusal of appellant to accord appellees the rights claimed was based in part upon the first and second grounds hereinbefore considered, and in part upon a finding that the official records on file in the agency on January 1, 1906 disclosed with reasonable certainty that Timothy died in November 1905, and that the records upon which appellant relied had no evidentiary value and could not have properly formed the basis for such a finding. It is apparently conceded in the opinion of September 15, 1933 (R. 21) that except for said

records and the evidentiary value mistakenly accorded them by the Secretary, the proof was clear that Timothy died on January 1, 1906.

We therefore submit that from any view that can be taken the Secretary acted outside of his authority and the judgment of the lower court was right and proper.

III.

The next question raised and discussed in appellant's brief (Brf. 34) is,

The mischievous consequences to be anticipated from reopening the Osage rolls after the lapse of 30 years should preclude the issuance of the prerogative writ of mandamus in the circumstances of this case.

No mischievous consequences could flow from the recognition of a right made absolute and continuing by positive law, even though the recognition had been long deferred. The delay was occasioned by the misconception by appellant of the ministerial character of the duty imposed by the Act of June 28, 1906 which was a continuing duty, and the inability of appellees, full blood Indians, to take steps at an earlier date to enforce their rights. The property of the Osage Indians is now in process of distribution, and the mistake heretofore made is now easily corrected. The Congressional mandate cannot be thwarted by the claim that it would necessitate some slight revision of the basis for distributive shares in the Osage property.

For the reasons hereinbefore stated it is respectfully submitted that the judgment of the lower court was right and should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

No. 6406

In the United States Court of Appeals for the
District of Columbia.

October Term, 1935.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Appellant,

v.

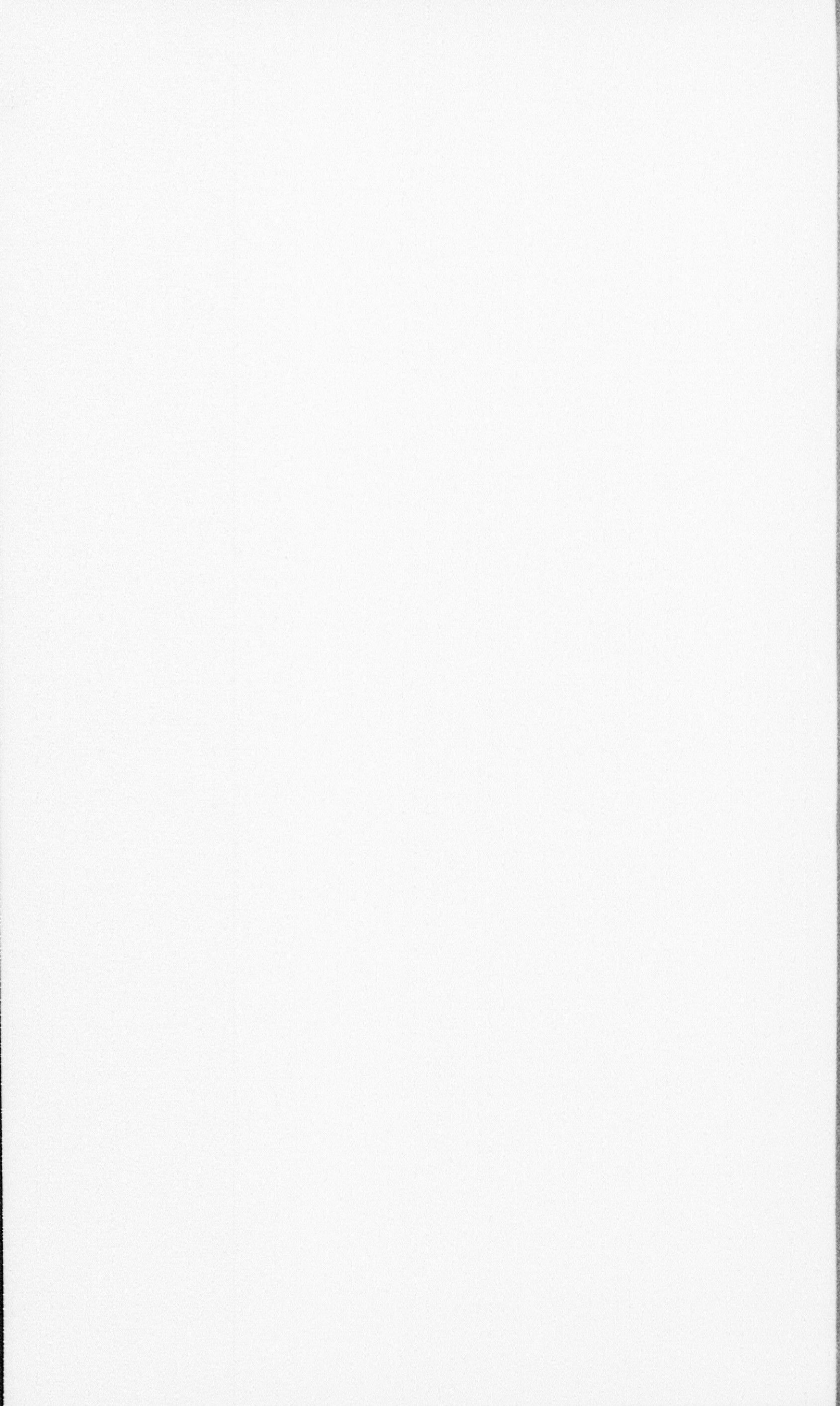
A. B. PATTISON, ADMINISTRATOR OF THE ESTATE
OF AMOS HAMILTON, DECEASED, AND MARIE
HAMILTON, *Appellees.*

Brief Amicus Curiae on Behalf of Osage
Tribe of Indians.

G. B. FULTON,
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Amicus Curiae;

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IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA.

October Term, 1935.

No. 6406

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Appellant,

v.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE
OF AMOS HAMILTON, DECEASED, AND MARIE
HAMILTON, *Appellees.*

BRIEF AMICUS CURIAE ON BEHALF OF OSAGE TRIBE
OF INDIANS.

Statement of the Case.

Amos and Marie Hamilton, husband and wife, petitioned the court below for a writ of mandamus directing the Secretary of the Interior to recognize the name of their deceased son, Timothy Hamilton, on the final roll of the Osage Indians, and to allow them as heirs-at-law a proportionate share of the tribal property in his behalf (R. 1-10). Amos Hamilton having died *pendente lite*, his administrator, A. B. Pattison, was substituted for him.

Appellant as defendant below in his return and answer denied the material allegations of the petition, asserting that the roll became final many years ago and that whether or not said name should have been placed thereon required

the exercise of judgment and discretion not controllable by mandamus; and for further answer set out the facts upon which the name of Timothy Hamilton was withheld from the final roll (R. 10-32).

Appellees' demurrer to the answer was sustained and the writ allowed, directing appellant to "recognize the name of relators' son, Timothy Hamilton, as now and all times heretofore, on the final roll of the Osage Tribe of Indians confirmed by the Act of June 28, 1906" (R. 34). Electing to stand upon his answer, appellant prosecutes this appeal to reverse the action of the lower court.

Nature of an Indian Tribe.

An Indian tribe is a body of Indians of the same or a similar race united in a community under one leadership or government and inhabiting a particular territory (*Montoya v. United States*, 180 U. S. 261.) The common property belongs to the tribe and no individual member has any vested interest therein until his share has been segregated and allotted to him. The right of an individual Indian to participate in this property depends upon tribal membership, which terminates at death (*Blackfeather v. United States*, 190 U. S. 368). Thus the interest of a member in the tribal property is merely the right to share in such distributions of same as may be made while he is alive, and in case of death it reverts to the tribe.

Legislative and Historical Background.

In consideration of a portion of the proceeds of the sale by the United States of certain lands in the Territory of

Kansas, then belonging to the Great and Little Osage Tribes of Indians who were negotiating a union of their two tribes, shortly thereafter effected, certain other lands, now Osage County, Oklahoma, were agreed to be purchased as a permanent home for them (Act of July 15, 1870, 16 Stat. 347). During the year 1872, by virtue of the Act of June 5, 1872 (17 Stat. 228), the President moved said Osages to their new acquisition. Under and by virtue of the Acts of March 3, 1873 (17 Stat. 538), and March 3, 1883 (22 Stat. 624), the transaction was consummated and the newly-acquired lands conveyed by the Cherokees through deed of June 14, 1833, to

The United States of America in trust for the use and benefit of the Osage Tribe of Indians.

Thereafter as a tribe and under governmental supervision the Osages began leasing large portions of said lands for grazing and other purposes. The balance of their funds received from time to time from the sale of their Kansas lands was placed in the Treasury of the United States to the credit of the tribe as a trust fund, which, pursuant to the said Act of 1870, drew interest at the rate of five per cent per annum. By the Act of August 19, 1890 (26 Stat. 344), the Secretary of the Interior was authorized and directed to disburse this income quarterly to the respective members of said tribe. By the Act of March 3, 1901 (31 Stat. 1065), quarterly per capita payments of grass rentals and any unpaid interest, in addition to interest on trust funds, were authorized, through a disbursing agent to be selected by the Secretary of the Interior.

Since the income was being disbursed quarterly per capita, it became incumbent on the Department of the Interior, through the Osage Indian Agency, to keep a definite record of births and deaths, with a quarterly per capita payroll to be amended or modified from time to time in keeping with said "records" and used for the ensuing payment. Thus the membership of the tribe was constantly fluctuating by reason of successive births and deaths. These quarterly payrolls did not require approval by the Secretary of the Interior, but were merely certified by the Agent.

Interest on tribal funds was computed every three months and placed to the credit of the tribe some time after the end of each quarter. Therefore when a payment was made it necessarily represented income from a previous quarter. Hence it usually happened that at least part of the income for a quarter had accrued prior to the decease of a member. Accordingly, while tribal membership and the right to participate in the common property terminated at death, in order that the family might have the benefit of income which the decedent would have received if alive—used generally for burial expenses (last sentence, paragraph 3, appellant's answer, R. 12)—and purely as a matter of grace, it was customary here, as at other places, to make one payment after death under a general regulation of the Indian Office approved by the Secretary of the Interior on April 1, 1904, as follows:

"5. Deceased Indians may be carried on the rolls for one payment after death. This applies to all periodical payments, whether the funds to be distributed are regular annuities or derived from sales of timber,

grazing privileges, or other miscellaneous sources. In other words, where an Indian has been accustomed to receiving regular payments of more than one kind of funds, he may be carried on the rolls for one payment of each after death, provided the same accrued during the lifetime of the annuitant.

“6. Each annuity roll will be carefully compared with the one immediately preceding, and, as far as practicable, the names on the two rolls will be made to correspond. The number of the individual on the previous roll will be entered in red ink opposite the name of the same individual on the current roll. If a name on the previous roll does not appear on the current roll, *the reason for the omission must be given.*” (Italics added.)

Such was the situation of the Osage Nation at the time of the passage of the Act of June 28, 1906 (34 Stat. 539), in question here.

Annuity Payments and Appurtenant Records.

An Indian nation, as were the Osages prior to allotment, has the right of local self-government and to regulate and control its own affairs and rights of persons and property (*Oklahoma Land Co. v. Thomas*, 34 Okl. 681; *Muskogee Natl. Tel. Co. v. Hall*, 64 S. W. 600; *Ortley v. Ross*, [Neb.] 110 N. W. 982). By virtue thereof the Osage Tribal Council in a very great measure assumed the responsibility of determining its own current tribal membership. In connection with the foregoing regulation of the Secretary of the Interior, and independent of the record of births and deaths kept by and at the Osage Agency, the Tribal Coun-

cil or Business Committee held a meeting shortly before each payment for the purpose of ascertaining births and deaths prior thereto. A definite "record" of its proceedings was kept and attached to the payroll shortly to be used (appellant's Exhibit E, R. 24-29, being the action of the Osage Tribal Council immediately in advance of the December 12, 1905, payment). So definitely conceded were the rights of the Tribal Council in this respect that on the records payments were made in advance of departmental authority. The council resolution was concluded at the Agency December 7, 1905, while the December, 1905, payroll bears date of December 12, 1905.

Often the absence of a distributee whose name appeared on a quarterly payroll was first explained by report of his death to the paymaster, notation of which was made opposite such name on the roll then in use. Also the report of a birth was sometimes first received at the pay counter, a notation thereof being made on the current roll in order that the name of such new-born might not escape proper entry on the forthcoming per capita payroll. *Such rolls, with said notations of births and deaths thereon, thus became a part of the records of the United States at the Osage Agency.*

Where records, as in the instant case, are necessarily made, kept, and maintained for a specific purpose, their future use as evidence is limited to such necessity and purpose. This is an old rule and its application is forcibly emphasized in *Hegler v. Faulkner*, 153 U. S. 109. To give effect to the Treaty of July 30, 1830, with certain tribes of Indians, Congress, by the Act of July 31, 1854 (10 Stat. 332), pro-

vided for allotments to *half-breed Indians* of the Iowa tribe. In conformity therewith such members were determined and the lands duly allotted. Thereafter litigation ensued involving the title to the lands received by George Washington. To establish the age of the allottee his successor offered to introduce in evidence portions of the allotment record. The Court held that *determining whether or not George Washington was entitled to an allotment* did not necessitate the finding of his *age*, and that any data compiled or kept in connection therewith was surplusage and not admissible in evidence. To the same effect is *Malone v. Alderdice*, 212 Fed. 668.

As stated, this was because the matter of age was immaterial in connection with the right to an allotment. *Here, on the contrary, as will be seen later, the fact of death prior to January 1, 1906, was the decisive point in the case and had to be determined by the Secretary of the Interior in order to ascertain whether or not Timothy Hamilton was entitled to enrollment under the act.* To the end that the foregoing Acts of Congress and the regulation of the Secretary of the Interior might be duly effectuated through a correct current quarterly tribal roll of living Osages, with deceased members brought forward thereon for one payment after death, the compilation and keeping at the Osage Agency of all of said records were absolutely necessary. With such records, supervised and maintained by the United States, kept as a matter of necessity, and by force of circumstances revised from time to time, Congress, by the Act of June 28, 1906 (34 Stat. 539), placed said essential records in evidence to establish the facts which had necessitat-

ed their compilation, and by so doing made such records the basis of a FINAL roll for the division of the lands and funds of the tribe.

The Act of 1906.

Section 1 of the act reads:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the roll of the Osage tribe of Indians, *as shown by the RECORDS of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory*, as it existed on the *first day of January, nineteen hundred and six*, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names were on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, *is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: Provided*, that the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said per-

sons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment on the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, AND THE SAID ROLL AS ABOVE PROVIDED, AFTER THE REVISION AND APPROVAL OF THE SECRETARY OF THE INTERIOR, AS HEREIN PROVIDED, SHALL CONSTITUTE THE APPROVED ROLL OF SAID TRIBE; *and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, twenty-eighth statute at large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.*" (Italics and capitals added.)

The purpose of the Act is stated in the title to be "for the division of the lands and funds of the Osage Tribe of Indians." To accomplish this division it was first necessary

to determine the persons entitled to participate therein. This could be done only by the preparation and approval of a *final* roll, the effect of which is permanently to fix the tribal membership and the number of units into which the common property is to be divided. Upon approval of such a roll the shares of deceased enrollees in future payments go to their heirs and after-born children are excluded. The roll was approved by the Secretary of the Interior on April 11, 1908 (R. 19); and does not contain the name of Timothy Hamilton.

Opposing Constructions of the Act.

Appellees'.

The contention of appellees is that the Act confirmed the December, 1905, payroll as to all persons listed thereon, *whether living or dead*, as the basic roll for the division of the tribal property; that because the name of Timothy Hamilton appears on said roll he became entitled, *though dead*, to a distributive share of such property; and that it was therefore the ministerial duty of the Secretary of the Interior to pay said share to his heirs.

Departmental.

Appellant's predecessor in office interpreted the Act as meaning that the basic roll for the division of the common property should consist of all tribal members *in being on January 1, 1906*, "as shown by the records of the United States" at the Osage Agency. As said records disclosed that Timothy Hamilton had died on November 19 or 20, 1905, his name was omitted from the final roll. This construction of the Act was based on an opinion of the Assistant Attorney General of the United States dated August 10, 1906 (R. 30), reading in part as follows:

“January 1, 1906, is the important date in this legislation. It is clearly intended that all members of the tribe *in being on that day* shall share in the distribution of the tribal property. The lands and funds of the tribe were communal property in which no individual held a separate interest or one that would descend at his death to his heirs. *By death the interest of the individual in the tribal property terminated.* Only those living January 1, 1906, had any interest therein that day. None could claim any interest by inheritance but held alone by virtue of his personal right of membership in the tribe. *The membership of the tribe as it was constituted January 1, 1906, must be treated as the thing had in view by the law.* An individual who died before that date was not then a member of the tribe and for the purposes of division of the tribal property under this Act *it must be considered that his name was erased from the tribal roll at the time of his death.*”

In his answer appellant sets out that Timothy Hamilton died in November, 1905; that his name was brought forward on the December 12, 1905, payroll as a deceased member for one payment after death; and that because he was not alive on January 1, 1906, he was not entitled to have his name inscribed on the final roll. Appellees' demurrer admits the facts alleged in the answer.

First and Second Assignments of Error.

Being intimately related, the first and second assignments of error may be conveniently treated together as though reading, “The Court erred in sustaining the demurrer and allowing the writ.”

(1) The petition itself is defective.

The duties which will be enforced by mandamus must

be such as are *clearly and peremptorily* enjoined by law (*United States v. Windom*, 137 U. S. 636; *United States v. Lamont*, 155 U. S. 303; *United States v. Union Pacific Railroad Co.*, 160 U. S. 1; *Missouri v. Murphy*, 170 U. S. 78). The petition must set out all facts necessary to entitle the relator to relief and show that a plain legal duty rests upon respondent to perform the act (38 C. J. 868).

Appellees based their case upon the following provisions of the Act:

First (Section 1). "That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the Office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six," with certain immaterial additions, "is hereby declared to be the roll of said tribe and to constitute the legal membership thereof" (R. 2).

Second (Section 1). "And the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as *hereinafter* provided." (Erroneously quoted in petition as "hereinbefore" R. 3).

Third (Section 4). "That all the funds of the Osage Tribe of Indians * * * shall be segregated * * * and placed to the credit of the individual members of said Osage Tribe on a basis of a pro rata division among the members of said tribe, as shown by the *authorized* roll of membership as herein provided for, or to their heirs as hereinafter provided" (R. 3).

Fourth (Section 6). "That the lands, moneys, and mineral interests herein provided for of any deceased member of the Osage Tribe shall descend to his or her legal heirs according to the laws of the Territory of

Oklahoma or of the state in which said reservation may be hereafter incorporated, except where a decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the father and mother equally'' (R. 4).

The roll in existence at the Osage Agency on January 1, 1906, was that for the quarterly payment made on December 12, 1905, which carried the name of Timothy Hamilton for one payment after death under the departmental regulation previously quoted herein. Appellees claim that the first provision confirmed this roll as the basic roll for the division of the tribal property; that the only authority given the Secretary of the Interior thereover was to add certain names and eliminate fraudulent enrollees as provided in the same section of the Act; that because the name of Timothy Hamilton appears on said roll he became entitled under the second and third provisions, whether living or dead, to a vested distributive share of the tribal property; that upon his death such share descended to his heirs under the fourth provision; and that it was therefore the ministerial duty of the Secretary of the Interior to pay same to petitioners in that capacity.

The language of the first provision is merely a statutory declaration and does not enjoin any duty upon the Secretary of the Interior. While, the second, third, and fourth provisions stipulate that the common property shall be equally divided among the members of the tribe or their heirs, they do not, either "clearly and peremptorily" or otherwise, direct the Secretary of the Interior to allow a distributive share of such property to one who died before

January 1, 1906, as had Timothy Hamilton, which is the relief asked herein; and there is no language elsewhere in the Act susceptible of this construction.

Thus the petition does not make out a case of mandamus, and the Act itself contains no provision commanding the Secretary of the Interior to perform the alleged duty sought to be enforced.

(2) The duty imposed upon the Secretary of the Interior by the Act is not controllable by mandamus.

The writ lies against a public officer only to compel the performance of a purely ministerial duty imposed upon him by law (*Kimberlin v. Commission to the Five Civilized Tribes*, 104 Fed. 653).

That duty in this case was the preparation and approval of a final roll of the Osage Tribe, which necessarily involved the exercise by him of independent judgment and discretion, not only as to the interpretation of the law, but also in the determination of the facts. Two questions of law early confronted the Secretary of the Interior in the administration of the Act—*first* (the Act being silent on the point), whether or not the names of persons who had died before January 1, 1906, should be inscribed on the final roll; and, *second*, if the death of a person alive on that date but who died before actually receiving an allotment of land, deprived such decedent of the right to same. His decision on these points was based upon the opinion of the Assistant Attorney General of the United States previously mentioned herein.

As to discretion in the determination of the facts, it

seems sufficient to mention section 12 of the Act, which reads:

“That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior.”

(3) Appellant's immunity to an action of mandamus herein is not dependent upon the correctness of his predecessor's interpretation of the law or determination of the facts.

This proposition is supported by the following cases (quotations from syllabi):

“The courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, *even where those duties require an interpretation of the law.*”

—*United States v. Black*, 128 U. S. 40.

Mandamus “may not lawfully issue to command or control an executive officer in the discharge of those of his duties which involve the exercise of his judgment or discretion, either *in the construction of the law*, or in determining the existence or effect of the facts. It may not lawfully issue to review, reverse, or correct the *erroneous* decisions of an executive officer in such cases, *even though there may be no other method of review or correction provided by law*. The Commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to it for citizenship in the Five Nations; * * * and *the courts have no jurisdiction*, by the use of the writ of mandamus, to *correct its errors, control its decisions, review or reverse its judg-*

ments, or to compel it to make different decisions upon these questions."

—*Kimberlin v. Commission to the Five Civilized Tribes*, 104 Fed. 653.

"Where an officer is given discretion as to construction of a statute under which he is to operate, the Court can not control his actions by mandamus, *although it may not agree with his interpretation of the statute.*"

—*Work v. United States ex rel. Rives*, 267 U. S. 175.

"A correct conclusion was not necessary to the finality and binding character" of the decisions of the Dawes Commission. "It may be that the Commission, in acting upon the many cases before it, made mistakes which are now impossible of correction."

—*United States v. Wildcat*, 244 U. S. 111.

However, as clearly shown under the third assignment of error, said interpretation and determination were not erroneous.

(4) The action of the Secretary of the Interior was not arbitrary or capricious.

The petition (R. 8) asserts that the action of the Secretary of the Interior in omitting the name of Timothy Hamilton from the final roll was arbitrary and capricious. There is nothing in the record to justify this allegation, and the point is not covered by appellees' brief. As stated elsewhere herein, all were treated alike, and no one was enrolled who was not alive on January 1, 1906, except children born between that date and July 1, 1907, as provided in the Act.

The action of the Secretary of the Interior in this case was based on the inherent nature of an Indian tribe and the opinion of the Assistant Attorney General of the United States; and, as shown later herein, was in accordance with the settled departmental practice, the policy of Congress, and the adjudicated cases. Therefore it was neither arbitrary nor capricious.

Third Assignment of Error.

“The Court erred in holding, in effect, that the death of Timothy Hamilton before January 1, 1906, did not prevent him from acquiring rights of tribal membership under the Act of June 28, 1906.”

(1) The Act did not confer tribal rights upon any person who died before January 1, 1906.

Section 1 provides, in effect, that the final roll for the distribution of the tribal property shall consist of the four classes named below:

- A. All persons who were members of the tribe on January 1, 1906, as shown by the “records of the United States” at the Osage Agency.
- B. All children born to such members between January 1, 1906, and July 1, 1907.
- C. All unenrolled children born to members in Class A.
- D. Persons with applications pending at the date of the Act and found entitled to enrollment by the Secretary of the Interior, not included in the three foregoing groups.

No person was entitled to enrollment unless coming within one or the other of these four classes. They alone were to comprise the final roll and participate in the division of the tribal property. There is no provision anywhere in the Act conferring the right to share in that property upon a member of the tribe who died before January 1, 1906. This is the decisive date, since it is the definite line of demarcation between tribal rights and individual ownership of the property. On the basis of the opinion of the Assistant Attorney General of the United States, no one was enrolled who was not then alive, except children born between that date and July 1, 1907.

Including Timothy Hamilton, there were on the December, 1905, payroll the names of twenty-four deceased members, all of whom were thereafter dropped, having been brought forward thereon solely by virtue of the regulation providing for one payment after death. Also, there were on this roll the names of six persons then alive but who died before January 1, 1906, none of whom was placed on the final roll. The twenty-three other persons in a position identical with Timothy Hamilton, as well as the six members who died after the December 12, 1905, payment and before January 1, 1906, were all dealt with in the same way.

(2) The Act did not confirm the December 12, 1905, payroll and give each person listed thereon, whether living or dead, a vested distributive share of the tribal property.

The relevant provision reads:

“That the roll of the Osage *tribe* of Indians, as

shown by the *records* of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as *it* existed on the first day of January, nineteen hundred and six" (Italics added), with the specified additions not material here,

"is hereby declared to be the roll of said tribe and to constitute the legal membership thereof."

Not "record," but *records*. The December 12, 1905, payroll is but one record. If it had been the intention of Congress to confirm this particular roll there would have been no necessity for using the plural form of the word. This language can only mean that *all pertinent records* at the Osage Agency showing the "legal" (living) membership of the tribe on January 1, 1906, were to be examined and the final roll made up in accordance therewith, *whether such records were compiled before or after that date*. The name of Timothy Hamilton appears on *six* different "records of the United States" at the Osage Agency (R. 20), as follows:

Roll for September, 1905, payment: Notation under Amos Hamilton family group, "Timothy, born Oct. 20, 1905."

Minutes of Tribal Council held on December 4, 1905: Timothy Hamilton, born October 20, 1905; died November 20, 1905.

Roll for December 12, 1905, payment: Timothy Hamilton, born October 20, 1905.

Roll for March, 1906, payment: Timothy Hamilton, died November 19, 1905.

Official record of births at Osage Agency: Timothy Hamilton, born October 20, 1905.

Official record of deaths at Osage Agency: Timothy Hamilton, died November 19, 1905.

As indicated, three of these records (the December, 1905, council minutes; the March, 1906, payroll; and the official record of deaths at the Osage Agency), show Timothy Hamilton's death prior to January 1, 1906.

As construed by the Secretary of the Interior on the basis of the opinion of the Assistant Attorney General of the United States, the phrase in question means that all members of the tribe living on January 1, 1906, together with the specified additions, were to be enrolled on the final roll, which was to be made up and approved by the Secretary of the Interior for the distribution of the tribal property. It was necessary to fix a specific date and to have an authoritative list of the members of the tribe at that time, *as the starting point for the preparation of the final roll*. This date was set at January 1, 1906. What better evidence of the tribal membership on said date could be had than the written records on file at the Osage Agency? It was perfectly natural, therefore, for Congress thus to limit the "legal membership" of the tribe at that time (January 1, 1906) and for the purpose indicated (to serve as the starting point for the preparation of the final roll). And this is all that the language means.

(3) Whenever Congress has intended to confirm a particular roll as a basis for the distribution of tribal property, it has used express language to this effect and specifically excluded decedents.

Section 21 of the Act of June 28, 1898 (30 Stat. 503), adopted and confirmed the 1880 Cherokee roll and the J.

W. Dunn 1867 Creek Freedmen roll, respectively, as follows:

“That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress.”

“The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed.”

Owing to the time that had elapsed such rolls, of course, carried the names of persons who had died since they were made up. To guard against their inclusion on the final rolls for tribal rights, in each case the Commission was directed by the Act,

“to enroll all persons *now living* whose names are found on said roll.” (Italics added.)

Here, on the contrary, the statute does not even mention the December 12, 1905, payroll, and the word “confirmed,” upon which appellees predicate their entire case, is not used.

(4) A dead person can not be a “legal” member of an Indian tribe.

The Act provides, in effect, that the roll of the Osage Tribe as it existed on January 1, 1906, as shown by the records at the Osage Agency, plus the specified additions, shall constitute the “legal membership” of the tribe. Thus, Congress plainly had in mind the membership of the tribe on that date as determined from the records at the Osage

Agency in accordance with the established legal principles of the matter.

A statute should be read in the light of earlier relevant acts and the general policy of the law at the time of its passage (25 R. C. L., page 1052, section 277). Prior to a final roll the right of an individual Indian to participate in the common property depends wholly upon tribal membership, which is terminated by death (*Fleming v. McCurtain*, 215 U. S. 56; *Sizemore v. Brady*, 235 U. S. 441). This rule is based upon the inherent nature of an Indian tribe, as previously discussed herein.

(5) On general principles, the departmental construction of the Act should not be set aside; and, in addition, it is upheld by the adjudicated cases.

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons (*United States v. Moore*, 95 U. S. 760; *Logan v. Davis*, 233 U. S. 613; *LaRoque v. United States*, 239 U. S. 62). No such reasons exist in this case.

The construction placed upon a statute by the officers whose duty it is to execute it, is entitled to great consideration (*Union Insurance Company v. Hoge*, 21 How. 35), especially if such construction has been made by the highest officers in the executive department of the Government (*United States v. Finnell*, 185 U. S. 236); and such construction should not be disregarded or overthrown unless it is clearly erroneous (*Sells v. United States*, 36 Ct. Cl. 94).

The construction of the Osage Act on the point here in

dispute was made by the Secretary of the Interior (the officer charged with its execution) on the basis of an opinion of the Assistant United States Attorney General; and appellees, upon whom the burden rests, have not shown that it is erroneous. On the contrary, it is submitted that the correctness of that construction has been demonstrated herein, as in accordance with the purpose and language of the Act, the settled departmental practice, the policy of Congress, and also the adjudicated cases as shown later herein.

However, it has been shown under the first and second assignments of error that appellant's immunity to an action of mandamus herein is not dependent upon the correctness of his predecessor's interpretation of the law or determination of the facts.

The weight to be given executive practice is increased when the legislature fails to indicate its disapproval of the settled departmental construction of a law, or where an implied approval of such construction may be deduced from subsequent legislation or failure to alter the practice by legislation. (*United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337; *United States v. Johnston*, 124 U. S. 236; *Robertson v. Downing*, 127 U. S. 607). No such disapproval was indicated in the present case.

Thus far the analysis of the differing views of the act entertained by appellant and appellees has been predicated solely upon the language used, measured by well-established rules of construction in the light of the applicable substantive law. However, there are adjudicated cases involving almost identical facts, in which, after conceding a certain

roll or census as adopted, it has been held that under similar acts living persons only are entitled to enrollment.

Under the Act of April 28, 1904 (33 Stat. 539), the allotment of the White Earth Reservation was authorized. Said Act, like the Osage, made no specific mention of deceased members. To make the allotments considerable preliminary work was necessary. While this was in progress the Secretary of the Interior issued the following instructions to the agent:

“But in making these additional allotments, the usual rule and practice of this office must be observed, namely, the Indian *must be in being* at the time the allotment is made or assigned to him; *in other words, no allotment can be made to a dead Indian.*” (Italics added.)

Thereafter, and before the details were perfected but in anticipation thereof, Joseph Woodbury filed with the agent an application to be allotted specific lands. Though the agent advised him that arrangements for allotting the lands in question had not yet been perfected, he left his application and shortly thereafter died. After all preliminary work had been completed, an attorney, purporting to act for and on behalf of the deceased, called attention to the application filed by him before his death. As the particular tract in question had been allotted to another Indian, the decedent was given other land in lieu of same. Thereafter the Secretary of the Interior, upon advice of the Attorney General, decided that the allotment to Woodbury was invalid because of his prior death, and forthwith cancelled it. Later Edith Woodbury, widow of the decedent and adminis-

tratrix of his estate, for and on behalf of herself and other heirs, made another application for allotment in the name of her deceased husband, and upon denial thereof instituted suit.

The trial court dismissed Mrs. Woodbury's bill. Her appeal reached the Circuit Court of Appeals of the Eighth Circuit in *Woodbury v. United States*, 170 Fed. 302, where, after a review of the facts, the Court, in affirming the action of the Secretary of the Interior and the judgment below, at page 305, held:

"Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. *This right, from its nature, would not descend to his heirs.* They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction."

To the same effect and on similar facts is *LaRoque v. United States*, 239 U. S. 62.

(6) Whenever Congress has spoken on the point in dispute it has uniformly recognized and applied the same rule by specifically limiting the distribution of tribal property to Indians living on a certain date.

The Acts cited below conclusively demonstrate this fact:

June 2, 1900 (31 Stat. 250), limiting rights to enrollment and distributive shares in the property of the Seminole Indians to persons "*living*" on the 31st day of December, 1899.

June 30, 1902 (32 Stat. 501), limiting rights to enrollment and distributive shares in the property of the Creek Tribe to persons "*living*" on May 25, 1901.

July 1, 1902 (32 Stat. 646), limiting rights to enrollment and distributive shares of the property of the Choctaw and Chickasaw Tribes to persons "*living* on the date of the final ratification of this agreement."

July 1, 1902 (32 Stat. 720), limiting rights to enrollment and distributive shares in the property of the Cherokee Tribe to persons "*living*" on September 1, 1902.

March 3, 1905 (33 Stat. 1071), authorizing the addition to the Choctaw and Chickasaw tribal rolls of the names of all children born subsequent to September 25, 1902, and prior to March 4, 1905, and "*living*" on the latter date; authorizing the addition to the Creek tribal rolls of all children born subsequent to May 25, 1901, and prior to March 4, 1905, and "*living*" on the latter date; and authorizing the addition to the Seminole tribal rolls of the names of all children born prior to March 4, 1905, and "*living*" on that date.

April 26, 1906 (34 Stat. 137), authorizing the enrollment of all children born to members of the Choctaw, Chickasaw, Cherokee, and Creek Tribes prior to March 4, 1906, and who were "*living*" on that date.

Appellees' brief (pages 19 and 20) cites these same Acts, apparently contending that in this single instance Congress made an exception of the Osages and vested a distributive share of the tribal property in a dead Indian *merely because the Act does not, in express language,*

exclude decedents. This implication is the only basis of their claim. The rule is just the opposite. Assuredly the *six* Acts of Congress cited (*all prior to the Osage law*) are sufficient to set up a general rule or established practice on this point, an exception to which is not lightly to be presumed, *but must be clearly shown.*

The legislature is presumed to have acted with knowledge of prior legislation on the same subject and judicial decisions thereunder; of the construction placed on any previous relevant law by the executive officers acting under it; and with full information of the subject-matter of the statute. It is presumed that the legislature did not intend to make any alteration in the existing law beyond what it specifically declares (59 C. J., page 1008, paragraph 600).

Therefore, to admit Osage *decedents* to participation in the tribal property contrary to the general rule, it would have been necessary to mention them specifically in the Act. This was not done.

Fourth Assignment of Error.

“The Court erred in not overruling the demurrer and dismissing the petition for lack of jurisdiction.”

(1) The Court did not have jurisdiction to allow the writ because the action of the Secretary of the Interior in this case is not controllable by mandamus.

This proposition has been already considered in detail under the first and second assignments of error, and nothing further need be said about it here.

(2) The Court did not have jurisdiction of the subject-matter because the roll in question is a final roll prepared

by authority of Congress for the distribution of the tribal property of the Osage Indians.

On general principles, necessarily such a roll must be final and conclusive. Otherwise there would be no "fixity" of the individual property rights which it is the purpose of the roll to set up, because the tribal membership would be constantly fluctuating by reason of successive births and deaths. This is the only way by which a permanent and equitable division of the tribal property can be made.

Further, however, the Act provides:

"And the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final."

On page 8 of their brief appellees contend that the finality of the action of the Secretary of the Interior was limited to the names over which he was given jurisdiction by the Act; and in the petition (paragraphs 5, 6, and 10, R. 4, 6) they allege that he had no jurisdiction over the name of Timothy Hamilton because same was not submitted under "fraud" proceedings in accordance with the Act. The point thus attempted to be made is immaterial. Under the opinion of the Assistant Attorney General of the United States the name had been automatically eliminated by death. The provision as to fraud proceedings applied only to living persons. As Timothy Hamilton was dead, no such proceedings were necessary in his case.

Similar final rolls for a like purpose have been made of the Five Civilized Tribes of Oklahoma under the Act of April 26, 1906 (34 Stat. 137). In several cases the Supreme

Court of the United States has upheld the finality of these rolls as against judicial interference. See *Lowe v. Fisher*, 223 U. S. 95; *Cherokee Nation v. Whitmire*, 223 U. S. 108; *United States v. Atkins*, 260 U. S. 220.

(3) In the present case (as to the Osages) Congress specifically abrogated the right of appeal allowed by the Act of August 15, 1894 (28 Stat. 305).

The applicable provision of this Act states:

“That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper Circuit Court of the United States.

“And said Circuit Courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.”

The repeal provision in the Osage Act reads:

“And the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right of appeal to the courts, *are*

hereby repealed as far as the same relate to the Osage Indians." (Italics added.)

An excerpt from the congressional debate on the bill follows:

"Mr. Finley: Does the gentleman think the taking away the right to resort to the courts to settle the membership of this tribe is good policy?

"Mr. Zenor: In answer to the gentleman, in reference to that matter, it seems to have been universally conceded that they wanted the matter settled in this summary way, without appeal to the courts." (40 Cong. Rec. 7200.)

On pages 14 and 15 of their brief appellees assert that the Act of 1894 is inapplicable to the circumstances of the present case because the Secretary of the Interior had no jurisdiction over the name of Timothy Hamilton; and hence that the repeal provision in the Osage Act did not operate to deprive them of access to the courts herein.

The point as to jurisdiction of the Secretary of the Interior over the name of Timothy Hamilton has already been answered. The repeal provision is in very broad and comprehensive terms and no exceptions are made. Therefore it would seem applicable to the present case.

(4) The Court did not have jurisdiction owing to the absence of necessary parties.

This point is discussed in detail under the fifth assignment of error and, like the first one hereunder, is repeated now merely as cumulative argument on the matter of jurisdiction, and so that all propositions thereon will be brought together in one place for the convenience of the Court.

Fifth Assignment of Error.

“The Court erred in not overruling the demurrer and dismissing the petition for absence of necessary parties.”

(1) Petitioners were not entitled to any notice of the final roll.

In paragraph 9 of their petition (R. 5) Mr. and Mrs. Hamilton complain that they had no notice of the preparation, closing, or approval of the final roll from which the name of their deceased son had been omitted. This was a matter of common notoriety among all the Indians, and it is inconceivable that Timothy's parents did not have full information about it. Aside from this, however, they were entitled to no notice (*United States, ex rel. Johnson, et al., v. Secretary of the Interior*, 253 U. S. 209). At the outset departmental officials led Mrs. Johnson and her associates to believe that they would be enrolled. In fact, a favorable report had been made to the Secretary of the Interior and he, in turn, had written to the Commissioner to the Five Civilized Tribes, saying, “Your decision is hereby affirmed,” of which no notice was given to Mrs. Johnson.

A few hours before the expiration of the time for the closing of the rolls the Secretary changed his mind *and, without notice* to Mrs. Johnson and her associates, ordered that they not be enrolled, and that their names be stricken from such rolls in the event they had been placed thereon. Alleging that they had no notice of the contemplated action, Mrs. Johnson and her associates sought a writ of mandamus to compel their enrollment, and upon its denial they prosecuted the appeal. The Court held:

“The Secretary of the Interior can not be compelled by mandamus to place upon the rolls of the Creek Nation the names of certain persons who, on the last day fixed by statute for the final completion of the rolls, he decided, reversing his prior decision *without notice to the Indians*, should be excluded from the rolls, with a direction that if they were already on the rolls, which was not the case, they should be stricken off.” (Italics added.)

(2) The Osage enrollees, their heirs and assigns, were not only entitled to notice, but they were necessary parties to the action herein.

Enrollment on a final roll of only the shortest duration *vests a right* which cannot be taken away without notice (*Garfield v. United States, ex rel. Goldsby*, 211 U. S. 249; *Ballinger v. Frost*, 216 U. S. 240). In the first case, under the Act of June 10, 1896, Goldsby made application to the Dawes Commission, and he and his minor children were by it enrolled. The Secretary of the Interior approved the action of the Commission on April 26, 1906. Goldsby selected his land and received a certificate of allotment from the Commission, but no patent was issued. On March 4, 1907, the date on which said rolls were to be closed, the Secretary of the Interior, without notice to Goldsby and his associates, erased his name from the roll and opposite the same caused the entry to be made, ‘Canceled March 4, 1907.’ The third paragraph of the syllabus in the case reads:

“The Secretary of the Interior is without authority to erase from the approved rolls of citizenship in the Choctaw and Chickasaw Nations, *without notice or*

hearing, the name of one who has received an allotment certificate and is in possession of the land.' (Italics added.)

The facts in the *Frost* case are very similar.

While appellees herein, as in the *Johnson* case, were not entitled to notice, undoubtedly the 2,229 Osage allottees, through enrollment, issuance of patents, and possession of their lands for many years, *have acquired certain vested rights* entitling them to notice of this action.

Though one becomes entitled to notice *immediately* upon the vesting of a right, the courts have not been hesitant to hold even more sacred rights such as those of the Osages, their heirs and assigns, *which have been vested for a long period of time* (*Culley v. Mitchell*, 37 F. 2d. 493; Circuit Court of Appeals, 1930).

The Dawes Commission to the Five Civilized Tribes considered only the tribal blood of the applicants, and as a consequence the child of a half-blood Seminole woman and a full-blood Creek was enrolled as a quarter-blood Seminole. Later, Congress by the Act of May 27, 1908, 35 Stat. 312, removed restrictions on the alienation of the allotted lands of persons of less than 50% Indian blood. Although a three-quarter-blood Indian, such person became entitled to sell his land without supervision because he was enrolled as a quarter-blood Seminole. Though said lands, as well as those of many other allottees under like or similar circumstances, had become valuable through the prospect or discovery of oil and gas, they were sold for little or no consideration. As regrettable and far-reaching as the situation was, the Court, in the *Culley* case, held:

“Finally, the Court is asked to reform the Seminole roll created by Act of Congress and approved by the Secretary of the Interior. While we have grave doubts of the power of any court to alter this roll, it is sufficient now to say that we can not enter an order reforming it *as of twenty-odd years ago and divest property rights which have attached in the interim on the strength of it.*” (Italics added.)

In contrast, is the order of the Court herein (R. 34), as follows:

“Thereupon, the Court being fully advised, it is considered, ordered, and adjudged that the respondent, Harold L. Ickes, be, and he is hereby, commanded within twenty days after this date to recognize the name of relators’ son, Timothy Hamilton, *as now, and at all times heretofore*, on the final roll of the Osage Tribe of Indians *confirmed* by the Act of June 28, 1906.” (Italics added.)

Persons having any material interest, however slight, in the result of the litigation are necessary parties respondent to an application for writ of mandamus, and an appellate court may, on its own motion, reverse a judgment granting the writ where it appears from the record that persons whose rights were adjudicated thereby were not made parties in the trial court (*Powell v. People*, 214 Ill. 475, 73 N. E. 795).

Mandamus will not lie as a general rule where the rights of third persons not parties would be injuriously affected. Where questions of grave importance concerning the rights of persons who have had no opportunity to be heard are involved in mandamus proceedings, the court, in the exercise of its discretion, may refuse the writ (*Duncan Townsite Co. v. Lane*, 245 U. S. 308).

If the name of Timothy Hamilton, simply because it appears on the December 12, 1905, payroll, should now be inscribed on the final roll, so should the names of the twenty-nine other deceased members similarly situated.

The approved final roll of the Osages divided their lands, funds, and future income into 2,229 equal parts. The distributees personally or through their heirs and assigns have held their respective interests without question since that time. If thirty additional names should be inscribed on the roll, which is the full import of the judgment below, the share of each distributee would be reduced to $1/2259$ of said lands, funds, and future income, yet none of the owners of the 2,229 shares was served with process or had any legal notice of the pendency of the suit.

In this connection, paragraph 1 of section 4 of the Act is very significant. It provides:

“That all the funds of the Osage tribe *shall be segregated* as soon as possible after January first, nineteen hundred and seven, and placed to the credit of the individual members of the tribe, *pro rata*, as shown by the *authorized* roll of membership as herein provided for, or their heirs, as herein provided.”

Thus the Act itself directs that the segregation be made, not on the December 12, 1905, payroll, as contended by appellees, *but on the final membership roll* to be made up and approved by the Secretary of the Interior in accordance with the Act. This is the roll which made the division into the 2,229 equal parts mentioned above. It alone conferred vested rights such as appellees erroneously claim on behalf of Timothy Hamilton, whose name is not on that roll.

It is thus apparent that the enrolled Osages, their heirs and assigns, have a pecuniary interest in this case because the share of each one in the tribal property would be proportionately reduced by the addition of the name of Timothy Hamilton to the final roll. Hence said enrollees, their heirs and assigns, were necessary parties. As they were not brought in, it is submitted that the court below had no authority to entertain this case.

In attempted answer to this proposition, appellees, on page 15 of their brief, cite the plenary power of Congress "over the Osage Tribe, its membership, and their property rights." This power is, of course, well settled *as to tribal rights and property*. Such, however, is not the question here. This assignment of error involves the deprivation of *vested individual property rights* by judicial fiat, and not by the Act, against which appellant makes no complaint, but is, on the contrary, seeking to uphold against the erroneous construction of the court below. Hence the mention by appellees of the plenary power of Congress is not in point here.

Undoubtedly Congress might, if it had seen fit, have given dead Osage Indians proportionate shares of the tribal property. But, as pointed out under the third assignment of error, to accomplish that result contrary to the general rule it would have been necessary to include them specifically. This was not done.

C o n c l u s i o n .

The petition is fatally defective in that it fails to make out a case of mandamus; and the Act contains no provision "clearly and peremptorily" commanding the Secretary of the Interior to perform the act in question. The preparation of the final roll under the Act involved the exercise of judgment and discretion by the Secretary of the Interior, both as to the construction of the law and the determination of the facts, and hence mandamus will not lie.

Appellees' construction of the Act, that it confirmed the December 12, 1905, payroll; that accordingly, it was the ministerial duty of the Secretary of the Interior to inscribe on the final roll the names of all persons appearing thereon, whether living or dead; and that because the name of Timothy Hamilton is on said December payroll he became entitled, though dead, to a distributive share of the tribal property, can not be justified by the language of the Act (*which neither mentions the roll in question nor uses the word "confirmed"*) and is utterly at variance with the well-settled rules for the determination of tribal rights.

On the contrary, the interpretation placed thereon by the Secretary of the Interior, as the responsible executive officer charged with administration of the act, that it contemplated the "legal" (living) membership of the tribe on January 1, 1906, as shown by the "records of the United States" at the Osage Agency, *merely as the starting point for the preparation of the final roll*, was based on an opinion by the Assistant Attorney General of the United States and is in harmony with the purpose and language of the Act;

the long-established practice in such matters; the adjudicated cases; and prior Acts of Congress. But the finality of the roll was in nowise dependent upon the correctness of that construction.

Said records show that Timothy Hamilton died in November, 1905, and that the only reason for the appearance of his name on the December, 1905, payroll was for one payment after death under departmental regulations. Hence, being dead, he was not a "legal" (living) member of the tribe on that date. Therefore his name was properly excluded from the final roll.

The Act itself makes the action of the Secretary of the Interior final and conclusive and specifically abrogates the right of appeal to the courts thereunder. The 2,229 persons whose names appear on the final roll, their heirs and assigns, adversely affected by the order, had no notice of the action and were not made parties below. Hence the trial court did not have jurisdiction.

Accordingly, for the reasons given, it is respectfully submitted that the judgment *should be reversed*.

G. B. FULTON,
Osage Tribal Attorney,
Amicus Curiae;

LOUIS N. STIVERS,
Special Attorney,
(Since Deceased);

TURIN B. BOONE,
Assistant Attorney.

Summary.

Assignments of Error and Propositions.

First and Second—

PAGE

The Court erred in sustaining the demurrer and allowing the writ.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1935.

No. 6406.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Appellant,

v.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE OF AMOS
HAMILTON, DECEASED, AND MARIE HAMILTON,
Appellees.

SUPPLEMENTAL BRIEF AMICUS CURIAE ON
BEHALF OF OSAGE TRIBE OF INDIANS.

G. B. FULTON,
Osage Tribal Attorney, Amicus Curiae.

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**SUPPLEMENTAL BRIEF AMICUS CURIAE ON
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I.

**It Would Be Impossible to Make An Equitable Redis-
tribution of the Osage Property at this Late Date;
and if the Order of the Lower Court Stands it Will
Cost the Tribe Directly About Four and One-Half
Million Dollars.**

On page 27 of appellees' brief it is stated, in effect,
that the property of the Osage Tribe is now in process

of distribution and that the alleged "mistake" can be easily corrected by a *slight* change in the basis of division.

The fact is, that all the land has been allotted in severalty and nearly \$242,000,000.00 of the tribal funds paid out on the final roll in per capita shares since 1908. These funds were derived principally from bonus and royalties on oil and gas leases. Under the original Act *the mineral interests* were to remain tribal property for twenty-five years. This period has been twice extended, so that, under existing law (Act of March 2, 1929; 45 Stat., 1478), said mineral interests will become the property of the individual allottees on April 8, 1958. In legal contemplation the segregation was made by the basic Act of June 28, 1906 (34 Stat. 539), and all that remains is the duty of the Secretary of the Interior to pay out the income as it accrues to the 2,229 persons whose names appear on the final roll, their heirs, and assigns, whose individual rights thereto vested upon approval of the roll under the Act.

If the order of the lower court stands, it will ultimately mean the addition of thirty names to the final roll and the payment to each one of a full distributive share in the property. About \$108,500.00 has been paid to each member of the tribe on the final roll since 1908. Adding the value of the land, interest, and estimated future payments, would make at least \$150,000.00 as the total value of a single share, or \$4,500,000.00 which the addition of thirty names to the roll would cost the tribe.

This would place 2,259 names on the roll. Further, as shown in detail on pages 7 and 8 hereof, there were fourteen unenrolled children born to members of the tribe prior to or *after* December 12, 1905, and *before*

January 1, 1906, who were still alive on the latter date. Hence their names were placed on the final roll in accordance with the Act as construed by the Secretary of the Interior on the basis of the opinion of the Assistant Attorney General of the United States.

Appellees' theory, which has been upheld by the lower court, is that the Act confirmed the December 12, 1905, annuity payroll as the basic roll for the division of the tribal property. If this view finally prevails, said fourteen children were erroneously enrolled on the final roll, as they do not appear on the December roll. Accordingly, their names would have to be removed from the final roll, thus making the total number of enrollees 2,245 instead of 2,229 as at present. These fourteen persons have received in per capita shares from the tribal income about \$1,517,000.00 to which they were not entitled if the construction placed upon the Act by the lower court is correct. On that theory this additional amount would be an indirect loss to the tribe, as there is no possibility of recovering same from the recipients.

Thus, a state of almost inextricable confusion; great loss to the tribe; and the disturbance of vested individual property rights, would necessarily replace the present settled condition of affairs, resulting in a multiplicity of suits and prolonged litigation.

II.

The Final Roll Was Prepared in Strict Conformity With the Statute.

The explanation and analysis given hereunder will make clear to the Court the exact procedure which was followed in the preparation of the final roll, and is sufficient, we believe, to establish this proposition.

Mrs. Jane Appleby, a white woman, was among the Osages long prior to the passage of the Allotment Act, and had become very active and instrumental in aiding departmental officials in locating and determining those entitled to enrollment. So valuable were her untiring efforts to this end that by authority of the Secretary of the Interior dated August 12, 1905, she was given a per capita share of the tribal income during her lifetime, and her name remained on the final roll opposite No. 950 to this extent without allotment of land or enrollment to a further degree.

At the date of the Act payments under the June 1906 per capita pay roll had been concluded only some two or three weeks. On this roll were the names of 1,999 distributees.

Except Mrs. Appleby, the entire 1,999 were tribal members in being January 1, 1906, or born subsequent thereto. On the March 1906 pay roll were ten deceased members, all of whom were alive on January 1, 1906, their names having been brought forward on such pay roll only for the purpose of receiving one payment after death under the Departmental regulation quoted in our original brief. Hence, according to the June 1906 pay roll, including the ten deceased members dropped from the March 1906 roll, there were 2,008 tribal members either alive on January 1, 1906, or born thereafter.

Subsequent to January 1, 1906, and before the making up of the June 1906 pay roll, there had been born to members in being January 1, 1906, forty children, and there were alive, therefore, on January 1, 1906, tribal members to the number of 1,968. As Timothy Hamilton was born October 20, 1905, and died November 19 or 20, 1905 (appellant's exhibits D, E, F,

G, and H, R. 24, 30), he was not one of said total. Subsequent to the making up of the said June 1906 pay roll and prior to July 1, 1907, there were born to said members in being January 1, 1906, a total of 146 children.

Children whose rights had been in dispute and who were not on the roll January 1, 1906, but whose parents were enrolled, including those of members married to white husbands, were found to be seventy-three in number.

Those with applications for enrollment pending at the approval of said Act, not included in any one of the three foregoing groups, were two in number.

RECAPITULATION

Members in being January 1, 1906, or born subsequent thereto, on June 1906 pay roll	1,998
Members alive January 1, 1906, deceased before March 1906 roll and dropped therefrom	10
At June 1906, pay roll, conceded members in being January 1, 1906, or born subsequent thereto.....	2,008
Born subsequent to January 1, 1906, and before making up June 1906 pay roll	40
Members in being January 1, 1906.....	1,968
Born subsequent to June 1906 pay roll and prior to July 1, 1907, to members alive on January 1, 1906.....	146
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Those with applications pending at passage of act, not otherwise enrolled	2
Mrs. Jane Appleby	1
Total on approved roll, which does not carry the name of Timothy Hamilton (appellant's Exhibit A. R. 19) ..	2,230

Mrs. Appleby died on or about November 17, 1918. This left 2,229 shares in the Osage tribal property.

The foregoing calculations, by choice, are predicated upon the June 1906 per capita pay roll. Appellees, apparently as a matter of argument, state that the December 12, 1905, pay roll (the roll of the tribe on file in his office January 1, 1906), was used by the agent for similar calculations in the preparation of the final roll (Petition, Par. 8, R. 5). In this they seem to be in error. Departmental officials in charge of the preparation of the final roll, while using the key dates specified in the Act and herein applied to the June 1906 pay roll, predicated their calculations upon the *March 1906 pay roll*, as shown by the final roll (R. 15-19) carrying in the middle column at the left of each page before the name of allottee his respective number on that pay roll.

Judging from the explanatory note at the beginning of the approved roll (R. 18), the March 1906 pay roll was so used because it represented the payment of income accruing in the quarter *ending* December 31, 1905, the last day of communal or tribal ownership, the Act having designated the basic final roll as of January 1, 1906. However, the same results might also have been obtained by using the December 12, 1905, pay roll.

As before stated, Timothy Hamilton was born October 20, 1905, and died November 19 or 20, 1905 (appellant's exhibits D, E, F, G, and H, R. 24, 30), and, therefore, his name is not on the approved final roll. On the December 12, 1905, pay roll there were the names of 1,984 tribal members and, with Mrs. Appleby, 1,985 distributees.

Including Timothy Hamilton, there were on the December 12, 1905, per capita pay roll the names of twenty-four deceased members, all of whom were

thereafter dropped, having been brought forward thereon solely for one payment after death, as follows:

Roll No.	Name	Age	Sex	Date of Death
16	Heh-scah-moie	63	M...	Oct. 5, 1905
85	Ne-ah-tse-pe	4/12	M...	Nov. 20, 1905
216	William Stephans	23	M...	Nov. 30, 1905
344	Wah-tsa-a-tah	4	F...	Nov. 12, 1905
374	Tah-tsa-ho-grah	3	M...	Oct. 18, 1905
375	E-wah-sah	1	M...	Oct. 1, 1905
379	Num-pah-se	1 da.	F...	Oct. 11, 1905
404	Marguerite Bangs	9/12	F...	Sept. 15, 1905
556	Nora Lookout	17	F...	Nov. 14, 1905
458	Roscoe W. Pryor	1/12	M...	Oct. 12, 1905
592	She-me-hun-kah	51	F...	Sept. 16, 1905
606	Heh-kah-mon-kah	59	F...	Dec. 3, 1905
673	Hon-sah-kah (Crazy)	27	M...	Oct. 23, 1905
742	Mo-se-che-he	56	F...	Dec. 10, 1905
1026	Moses Y. Cedar	3	M...	Aug. 28, 1905
1030	Mary Clem	62	F...	Jan. 4, 1905
1246	Julia Herridge	47	F...	Dec. 8, 1905
1264	Ben Hildebrand	1	M...	Nov. 25, 1905
1529	Susie Pappin	46	F...	Nov. 12, 1905
1645	Viola L. Revard	2	F...	Nov. 7, 1905
1750	Wesley Scott	31	M...	Nov. 15, 1905
1961	He-ke-op-pe	1/12	F...	Nov. 10, 1905
1967	Timothy Hamilton	2/12	M...	Nov. 19, 1905
1985	Che-to-kah-in-kah	3/365	M...	Dec. 8, 1905

Children entitled to enrollment, not on the December 12, 1905, pay roll but born to members of the tribe before or after the making up of same and prior to or on January 1, 1906, and alive on said date, enrolled *prior* to the date of the Act, were fourteen in number, as follows:

March Roll No.	June Roll No.	Allot. Roll No.	Name	Born
489	486	537	Louis Brave	Dec. 25, 1905
952	954	1062	Frank R. Brown	Dec. 14, 1905
1032	1034	1145	Frantz Clem	Dec. 10, 1905
1493	1507	1692	Thelma V. Mosier	Dec. 4, 1905
1561	1576	1771	Roy B. Perrier	Dec. 29, 1905
1682	1699	1905	Mary G. Revard	Dec. 25, 1905
.....	902	991	Sybil A. Beekman	(3 yrs. old)
.....	903	992	Mary A. Gorman	(9 yrs. old)
.....	1092	1222	Geo. O. Dennison	Dec. 18, 1905
.....	1122	1252	Martha M. Denoya	Dec. 31, 1905
.....	1235	1387	Roland C. Hampton	Nov. 12, 1905
.....	1299	1461	Opal Javine	Dec. 19, 1905
.....	1776	1988	Mary M. Scott	Dec. 31, 1905
.....	1998	1265	James C. Deal	Jan. 1, 1906

There were also on the December 12, 1905, per capita pay roll the names of six persons who died thereafter but before January 1, 1906, and whose names do not appear on the final roll, as follows:

Dec. 1905 Roll No.	Name	Age	Sex	Date of death
11	Me-shet-tsa-a	9/12	M	Dec. 14, 1905
226	Mary Gibson	1	F	Dec. 22, 1905
553	Wah-ko-ki-he-kah	36	F	Dec. 22, 1905
576	Bennie Strikeaxe	33	M	Dec. 28, 1905
1343	Lanum Burter			Dec. 23, 1905
1570	Josephine Peters		F	Dec. 20, 1905

RECAPITULATION

Members on December 12, 1905, pay roll	1,984
Deceased members carried forward thereon.....	24
Living members at December, 1905 payment	1,960
Not on said roll, born prior or subsequent thereto and on or before January 1, 1906, entitled to enrollment.....	14
Members dying subsequent to December 12, 1905, pay roll and before January 1, 1906	6
Members with conceded rights in being January 1, 1906.....	1,968

Born between January 1, 1906, and July 1, 1907.....	186
Children in being January 1, 1906, but not on roll with parents, including those of members with white husbands.....	73
Those with applications pending at passage of act, not other- wise enrolled	2
Mrs. Jane Appleby	1
Total on approved roll	2,230
Less Mrs. Appleby, life estate	1
Current definite distributive shares.....	2,229

Under the Act, as shown by the approved roll (appellant's exhibit A, R. 15-19), no one was enrolled who was not alive on January 1, 1906, except those born between that date and July 1, 1907. The twenty-three other deceased members in a position identical with Timothy Hamilton, as well as the six persons dying subsequent to the December 12, 1905, payment and before January 1, 1906, were all dealt with in the same way.

It is realized, of course, that the matters set out herein do not appear in the record. However, they are based on official "records of the United States" at the Osage agency, of which it would seem that the Court may properly take judicial notice, especially as they relate exclusively to the final roll, which is on file herein but not printed, and serve to explain how that roll was made up.

Respectfully submitted for the information of the Court.

G. B. FULTON,
Osage Tribal Attorney, Amicus Curiae.

FILED OCT 14 1935

Henry H. Morgan

No. 6406

In the United States Court of Appeals for the
District of Columbia.

October Term, 1935.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Appellant,

vs.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE
OF AMOS HAMILTON, DECEASED, AND MARIE
HAMILTON, *Appellees.*

Brief of Neal E. McNeill, Tulsa, Oklahoma,
Amicus Curiae.

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IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA.

October Term, 1935.

No. 6406

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
Appellant,

vs.

A. B. PATTISON, ADMINISTRATOR OF THE ESTATE
OF AMOS HAMILTON, DECEASED, AND MARIE
HAMILTON, *Appellees.*

BRIEF OF NEAL E. McNEILL, TULSA, OKLAHOMA,
AMICUS CURIAE.

Statement.

The roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, as it existed on January 1, 1906, contained the name of Bennie Strike Axe, opposite Roll No. 588, Wah-Ko-Ki-He-Kah, opposite Roll No. 565, Mary Gibson, opposite Roll No. 234, Burter Lannum, opposite Roll No. 1341, Josaphine Peters, opposite

Roll No. 1570, and the heirs of said members of the tribe now have on file an application before the Secretary of the Interior to have the "headright" of said members credited with their pro rata part of the funds provided for in the Osage Allotment Act, and are therefore interested in the construction of the Act of June 28, 1906 (34 Stat. L. 539), to be given in the case now before this Honorable Court.

The similarity of the facts relied upon by the heirs above to the facts in the instant case is apparent from the statement of the facts contained in the brief filed with the Secretary of the Interior in the *Bennie Strike Axe* case, which facts, condensed, are as follows:

Statement of Facts in *Bennie Strike Axe* Case.

The children of Bennie Strike Axe, an Osage Indian by blood, enrolled upon the December 1905 Annuity Payroll of the Osage Tribe of Indians, as shown by the records of the United States Indian Agent at the Osage Agency, opposite Roll No. 588, allege Bennie Strike Axe was enrolled as a member of the Osage Tribe of Indians many years prior to January 1, 1906; and believe his name appeared upon the roll of December 31, 1881; that it has been transcribed on all succeeding rolls up to and including the March 1906 Annuity Payroll, and there has been paid to Bennie Strike Axe all of the annuity payments distributed under said payrolls; however, the March, 1906, payment was made to his heirs.

It is contended, under and by virtue of the fact that the name of Bennie Strike Axe appears upon the Decem-

ber 1905 Annuity Payroll, opposite Roll No. 588, as shown by the records of the United States, in the office of the United States Indian Agent at the Osage Agency, as it existed on January 1, 1906, under the Act of Congress of June 28, 1906, he was on the declared roll, and his membership in the Osage tribe was established, and being so declared by said Act of Congress, there became vested in him and his heirs the right to participate and receive the pro rata part of the funds, lands, and mineral interests belonging to said tribe of Indians, and became possessed of what is commonly known and referred to as an Osage "headright."

The right of the heirs of Bennie Strike Axe, *et al.*, to participate in the "headrights" above named, insofar as said right is disclosed on the face of the Osage roll, as it existed on the 1st day of January, 1906, is, I believe, identical on the facts with the *Timothy Hamilton* case, unless the roll on January 1, 1906, affirmatively disclosed that Timothy Hamilton was deceased at said time, except the names above mentioned had all been on previous rolls, and three of the names were on the roll prior to December, 1881. While not believing it material or competent, if the court should hold that the March 1906 Roll is competent in the case at bar, there is a distinction between the rights of said heirs, and the heirs of Timothy Hamilton in the following particulars:

The March 1906 Roll discloses the names above set forth were all transcribed thereon as members of the tribe, and the March 1906 Annuity Payment was made to the

heirs of each of said parties above named, while in the *Timothy Hamilton* case, his name was transcribed upon the March 1906 Roll and the annuity payment refused because, as disclosed by the roll, it was contended he had died prior to the payment under the December 1905 Annuity Roll and, therefore, was not entitled to have his name placed upon the March 1906 Roll, and a notation to said effect was made on the March 1906 Roll.

Statement of History of Osage Legislation.

The statute under consideration refers to the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, as it existed on January 1, 1906, which is declared to be the roll of the tribe. It is believed a better understanding of the roll, and the manner in which it was kept, can be had by referring to some of the earlier Acts of Congress applicable to the Osage Indians, relating to the roll and the manner of disbursing the funds to said Indians, and defining the duties of the Osage Indian Agent.

In the year 1824 (4 Stat. L. 25) Congress authorized the appointment of an Osage Indian Agent which agent was required to reside and keep his agency within the territorial claim of the Osages, and on June 30th, 1834 (4 Stat. 737), Congress defined the duties of the various agents throughout the United States, and among other things provided the President might direct that money, goods and supplies be furnished the Indian tribes and be distrib-

uted in any one of the following manners, to-wit: By disbursingf the same to the chiefs of the tribe, or to such person as the tribe might appoint, or to the head of the family and those individual Indians entitled to participate, or under such regulations not inconsistent with the treaties as should be prescribed by the Secretary of the Interior. Said act further provided that the President, at the request of any tribe to which an annuity was payable, might cause the same to be paid in goods. Said act further provided that all persons charged with the disbursement of moneys for the benefit of the Indians should settle their account annually at the Department of the Interior on the 1st day of October of each year, and that copies of the accounts should be laid before Congress at the commencement of the ensuing year, together with a list of all persons to whom money, goods or effects had been delivered within the preceding year.

Thereafter, under the Act of January 16th, 1838 (5 Stat. L. 209), it was provided that certain goods or supplies might be distributed to the Osage Indians in lieu of the annuities due them for the year 1838. In the Act of March 3, 1857 (11 Stat. L. 169), it was provided that in the discretion of the President, the payments of all money, whether annuity or otherwise, to fulfill treaty stipulations, should be made in person by the Superintendent of Indian Affairs to all Indians of the tribe within the limits of their respective superintendencies, in the presence of the local agents and interpreters, who should witness the same, under such regulations as the Secretary of the Interior might prescribe.

The Act of June 5, 1862 (12 Stat. L. 529), provided the manner of making payment or disbursing funds due incompetent and orphan Indians. The Act of March 3d, 1865 (13 Stat. L. 461), authorized the Secretary of the Interior to pay annuities to the various tribes, in coin.

The Act of March 3d, 1875 (18 Stat. L. 449), by section 4, provided that, for the purpose of properly distributing supplies to the Indians, themselves, it should be the duty of each Indian Agent to make out, at the commencement of each fiscal year, a roll of the Indians entitled to supplies at the Indian Agency, with the names of the Indians, the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families and not to the heads of tribes or bands. Section 10 of said act provided that each Indian Agent should keep a book of itemized expenditures of every kind, with a record of all contracts, together with receipts for money from all sources; and the books shall always be open to inspection and should remain in the office of the respective reservations, not to be removed from said reservation by the agent, but should be safely kept and handed over to his successor; a true transcript of all entries of every character in said books to be forwarded quarterly by the agent to the Commissioner of Indian Affairs.

The Act of August 19th, 1890 (36 Stat. L. 336), authorized and directed the Secretary of the Interior to pay the Osage Indians in quarterly payments the interest on their land and fund as it accrued.

The Appropriation Act of June 10, 1896 (29 Stat. L.

336), provided that any sums of money thereafter to be paid per capita to the individual Indians, should be paid to said Indians by an officer of the Government designated by the Secretary of the Interior.

The Act of June 28th, 1898 (30 Stat. L. 502), provided that no payment of any money of any account should be paid by the United States to any Tribal Government or official thereof, for disbursement, but that the payment of all sums to the members of said tribe should be made through the Secretary of the Interior by an officer appointed by him, to each individual in lawful money of the United States, the sum not to be liable to the payment of any debt.

The Act of March 1, 1899 (30 Stat. L. 949), provided that thereafter all Indians, when they arrived at the age of eighteen years, should have the right to receive and receipt for all annuity money due them, or to become due them, if not otherwise incapacitated under the regulations of the Indian office.

It is a matter of common knowledge that the Osage Indians removed from the State of Kansas to Oklahoma Territory about the year 1872, and the Osage Indian Agency was established at the Osage Agency, Oklahoma Territory, at said time, and has been maintained at said place since said time; that for many years, or since the year 1890, in compliance with 36 Stat. L. 336, there had been paid to the Osage Indians, through the Osage Agency, quarterly payments in March, June, September and December of each year; that prior to each payment, the Osage Indian Agent would prepare what is commonly known and designated as

the March, June, September and December annuity payrolls; these payrolls, to conform to the various Acts of Congress above referred to, were made upon a form prepared by the Government, which form, when completed, contained not only the names of the various individual members, but, in addition thereto, an identification as to whether the head of a family, wife, son, or daughter, together with age and sex, the per capita allocated to each, the amount paid, the mark or signature of the party receiving the same, the signature of witnesses and the date of the receipt; there was also a space for "Remarks" in which was inscribed the number of the voucher used to make payment and any other information. The disbursements closed on the March Roll, the 31st day of March of each year; the disbursements under the June Roll would close on the 30th day of June each year, and the September Roll would close on the 30th of September of said year, and the December Roll on December 31st of said year. The Osage Indian Agent, in complying with the Acts of Congress on the 1st of January, April, July and October, would certify the roll of the previous quarter, showing the disbursement thereon, to the Commissioner of Indian Affairs.

These annuity payrolls were prepared by the Osage Indian Agent in substantially the following manner:

(a) Said agent, in preparing a given roll would take the names appearing on the last previous roll as a guide, and transcribe the names of all members appearing thereon, eliminating therefrom only the names of those Indians which the last previous roll affirmatively disclosed had died prior to the payment under said previous roll.

(b) After transcribing the above names on the new roll, said Osage Indian Agent would call a special meeting of the Osage Council to pass upon applications pending for enrollment, if any, and upon children born to members since the preparation of the last previous roll, or before, but who were not upon said previous roll; the names of those acted upon favorably by the Osage Council for enrollment would be submitted, by resolution, to the Osage Indian Agent for approval, and if approved by the said Osage Indian Agent, said name or names so approved would be transcribed by him on said roll.

(c) Upon having transcribed the names as set forth in Subdivisions "A" and "B", *supra*, on said roll, said roll was declared closed, and remained closed until the preparation of the next succeeding roll, and said roll, so prepared, was used as a correct basis for the distribution of the funds to be paid under said roll, and constituted a complete list of all members of said tribe who were thereby entitled to participate in said payment.

(d) In disbursing the funds, each member signed the roll receipting for the funds received, and two witnesses signed as witnesses, and the agent placed upon the roll the number of the voucher under which the payment was made; so the payroll proper, when completed, consisted not only of the roll of the members of the tribe, but the record of the disbursement under said roll.

On or about December 1, 1905, the Osage Indian Agent, for the purpose of making disbursement of the December 1905 Annuity Payroll, prepared what is commonly known

and referred to as the December 1905 Annuity Payroll. Said roll was prepared by transcribing thereon all names appearing upon the September 1905 Roll, eliminating or dropping only those names of persons which the September 1905 Annuity Payroll affirmatively disclosed had died prior to the disbursement of the funds under said September 1905 Payroll, and, the Osage Council having, upon call of the Osage Indian Agent, met on or about December 4, 1905, for the purpose of considering applications then pending for enrollment, and adopted a resolution requesting that certain names be added to said roll, and the names so requested being approved by the Secretary of the Interior, were added by him to said roll as additional members of the tribe. Upon transcribing said additional names upon the roll, said roll was closed, and, on December 12, 1905, the Osage Indian Agent began to disburse the December 1905 Annuity Payment to those members whose names appeared upon said roll. The said roll was closed on the 12th day of December, 1905, and the annuities distributed thereunder, and the distribution was closed on the 31st day of December, 1905, and a certified copy of said annuity payroll was duly certified by the Osage Indian Agent to the Commissioner of Indian Affairs. If any member failed to appear and claim the amount allocated to him, prior to December 31st, 1905, a notation would be made upon the roll certified to the Secretary of the Interior, disclosing said fact, and an adjustment made during the March payment.

In disbursing the funds to the individual Indians, upon proof that a member whose name was upon said roll had died since the September 1905 payment, the said agent

would disburse the funds allocated to said member to his next of kin and make a notation under the heading "remarks" on the roll that the member was dead, thus completing the roll record of that particular member of the tribe.

The above are the surrounding facts and conditions, as they existed on the 21st day of February, 1906, when the "Osage Allotment Act" was introduced in Congress. The principal clause of section 1 of said act as introduced and passed, without amendment, reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six * * * is hereby declared to be the roll of said tribe and to constitute the legal membership thereof."

Immediately following the above clause is a proviso, which provides, in substance:

1. That the Principal Chief of the Osages shall, within three months from and after the date of the approval of said act, file with the Secretary of the Interior a list containing the names of those the tribe claims are upon said roll by fraud, and the Secretary of the Interior is authorized to make an investigation thereof and to strike such names as are contained in said list which he, after investigation, finds have been placed upon said roll by fraud.

2. That the Secretary of the Interior shall add thereto names of those whose applications for enrollment are pend-

ing at the date of the approval of the act, which he finds to be entitled to enrollment.

3. And said roll, as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe, and the action of the Secretary of the Interior in the revision of the roll shall be final.

It is then provided that the lands and tribal funds shall be equally divided among the members of the tribe as therein provided.

The first portion of section 1, being the principal clause, is a complete enactment in and of itself, and the force and effect of said enactment is subject only to the limitations provided for in the provisos. The language "the roll, as shown by the records of the United States in the office of the United States Indian Agent, at the Osage Agency, as it existed on the 1st day of January, 1906," is plain and unambiguous that said roll is the declared roll of the tribe and the persons whose names appear thereon constitute the legal members of the tribe, except only their membership could be contested in the manner provided for in the proviso.

In this brief, I shall refer to the Act of June 28, 1906 (34 Stat. 539), as the "Osage Allotment Act"; and to the right conferred upon one whose name appeared upon said roll, declared by Congress to be the roll of the tribe and to constitute the membership thereof, to participate in the lands and the distribution of the funds provided for in said act, as a "headright." The Circuit Court of Appeals of the 10th Circuit has said the benefits provided for under said act are

commonly known and referred to as an "Osage headright." *Quarles v. Dennison*, 45 F. (2d) 585; *Taylor v. Tayrien*, 51 F. (2d) 884 (in which case a writ of *certiorari* was applied for in the Supreme Court of the United States and denied, 284 U. S. 672, 53 S. Ct. 127); *Re Irwin*, 60 F. (2d) 494.

I shall state the propositions of law and fact in the form of separate propositions, and the argument and authorities pertinent to each proposition will be stated thereunder.

PROPOSITION I.

The roll of the Osage Tribe of Indians referred to in section one of said Osage Allotment Act is the December 1905 Annuity Payroll, as shown by the records of the United States at the office of the United States Indian Agent at the Osage Agency, as it existed on January 1, 1906.

In construing the Osage Allotment Act, the first question necessary for determination is to identify the roll referred to by Congress as the roll of the Osage Tribe of Indians as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, as it existed on January 1, 1906. In determining this fact, it is well to bear in mind that the Osage Allotment Act was introduced in Congress on February 21, 1906; and the portion of said act which involves the construction upon this appeal and material in ascertaining what roll Congress referred to, reads as follows:

“That the roll of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of

January, nineteen hundred and six, * * * is hereby declared to be the roll of said tribe and to constitute the legal membership thereof; * * *.”

This portion of the act was passed as introduced, and was never amended, nor were any amendments ever offered. Congress, by the use of the language, *supra*, referring to “the roll”, and by the use of the term thereafter in the proviso, and in other sections of the act, meant some definite and specific roll. The proviso refers to the names placed on “the roll” prior to the 31st day of December, 1881, the date of the adoption of the Osage Constitution. Congress, the Indian agent, and the Secretary of the Interior, when said act was introduced, were familiar with the fact that prior to each annuity payment the Osage Indian Agent prepared a roll of the members of the tribe of Indians, and that said roll was prepared by transcribing thereon the names of all Indians appearing on the previous roll, eliminating only those names which the previous roll affirmatively disclosed were deceased prior to making the payment thereunder, and adding thereto the new names approved by resolution of the Osage Council and by the Secretary of the Interior. Congress, the Indian Agency, and the Secretary of the Interior were also familiar with the history of the previous acts, which provided that payments were to be made to the heads of families and to each individual Indian, and with the fact that the last official roll on file in the office of the Osage Indian Agent at the Osage Agency which contained the names of all members at the time of introducing the bill in Congress was the December 1905 Roll, and that those whose names appeared on said roll constituted the en-

tire recognized membership of said tribe, and were the only persons entitled to participate in, and who did participate in, the distribution of the funds paid in December, 1905. They further knew that said roll was closed on or prior to December 12, 1905, and that no additional names would be added thereto and that said roll would continue to constitute the last official roll of the tribe until the preparation of the March 1906 Roll; and further knew, that, according to the usual custom and practice, all names upon said roll, except the names of those members the roll affirmatively disclosed were deceased at the time of making the payment under the December Roll, were entitled to have their names transcribed upon the March 1906 Roll and be entitled to their pro rata share of the funds to be distributed under said March 1906 Annuity Payroll.

The act being introduced in Congress February 21, 1906, it therefore must be apparent that Congress, in referring to the roll of the Osage Tribe of Indians, as it existed on the 1st day of January, 1906, referred to what is commonly known as the December 1905 Annuity Payroll.

That Congress did refer to the roll of December 12, 1905, is supported by the remarks of Congressman Curtis, in discussing the bill (Vol. 40, Congressional Record, May 21, 1906, page 7413), who, in referring to the roll said:

“The bill does provide that the present roll will be taken as the roll of the tribe except that the chief may file a complaint within a certain time alleging that certain people are there by fraud.”

The December 1905 Annuity Payroll constituted the last legal or recognized roll made under official authority

that was in existence on the 1st day of January, 1906, and was the last official roll that existed when the Osage Allotment Act was introduced in Congress. It is therefore apparent from the act itself, the manner in which the rolls had been prepared, and from the remarks of the then Congressman Curtis, that the roll prepared on or prior to December 12, 1905, under which the December 1905 Payment was made, was the roll referred to in section one (1) of said Osage Allotment Act.

PROPOSITION II.

Under the enacting clause of section one of the Osage Allotment Act, the December 12, 1905, Annuity Payroll was declared to be and established as the roll of the tribe, and the names appearing thereon were declared to be the legal members thereof.

If correct in our conclusion that the roll referred to in said Osage Allotment Act was the December 12, 1905, Roll, as shown by the records of the United States, in the office of the Osage Indian Agent at the Osage Agency, as it existed on the 1st day of January, 1906, then the enacting part of said section relating to the roll, as applicable to those whose names which appeared upon said roll, reads as follows:

“The roll (meaning the roll of December, 1905) of the Osage Tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the 1st day of January, 1906, * * * is hereby declared to be the roll of said tribe and to constitute the legal membership thereof.”

It is clear from the language used that Congress intended to, and did, in plain and unambiguous language, fix and determine the roll that governed and controlled as to who were members of said tribe, and the names appearing upon said roll constituted the legal membership of said tribe.

It was essential that the membership of the tribe be established, in order that consequent rights provided for in the statute could be determined, and for the distribution of the lands and moneys of the tribe, to the members of the tribe, and to no one else.

The Circuit Court of Appeals of the Tenth Circuit has had before it many times the rights growing out of the Osage Allotment Act. Said court, in the case of *Taylor v. Tayrien*, 51 F. (2d) 884, in defining what rights were conferred upon a member of the tribe, defined the same to be a "headright" and, in determining whether said "headright" would pass to the trustee in bankruptcy proceedings, the court, in discussing this question, stated as follows:

"By sections 1 and 2 of the underlying Osage Act (Act of June 28, 1906, 34 Stat. L. 539) the *roll of the tribe was established* and each member was declared to be entitled to an equal share of the tribal lands and tribal funds."

The same court in a later decision, *United States v. LaMotte*, 67 F. (2d) 788, had under consideration the contention by the government that certain lands inherited were restricted lands, and the question arose whether George Allen was a member of the Osage Tribe of Indians, he being born after July 1, 1907, his parents being members whose names were contained upon the December 1905 Roll, and

lands inherited by him were restricted lands. The court after quoting the principal clause of section one, or the portion immediately preceding the proviso, in full, and in construing said clause, being the same clause necessary to construe herein, stated as follows:

“Appellant argues that the statute relates exclusively to the official roll of the tribe; that it prescribes the names which shall constitute such roll; that it provides the names which shall constitute membership of the roll, not membership of the tribe. In other words, it is urged that young Allen was a member of the tribe but not a member of the roll for allotment purposes. Congress clearly undertook *to provide membership in the tribe* in order that consequent rights could be determined therefrom. Merely fixing a roll and declaring who should be members of it, not members of the tribe, would be legislative fiction. We do not think Congress willed to do that. Keeping the obvious purpose of the act in mind and without indulging in technical grammatical refinements concerning the antecedent to which the language of the statute, ‘and to constitute the legal membership thereof,’ refers, *it is obvious that Congress intended to provide that the names of those specified in the act should constitute the official roll of the tribe and that such persons should constitute the membership of the tribe.*”

The Supreme Court of the United States, in the case of *Kenny v. Miles*, 250 U. S. 58, 39 S. Ct. 417, had under consideration the question of whether certain lands allotted to heirs of a deceased member of the tribe were restricted or unrestricted. The court, in the opinion, stated as follows:

“(2) To determine whether the land ordered to be partitioned or sold were restricted requires some con-

sideration of the Act of 1906, for it was under that act that they were allotted and the tribal deeds issued. By its first section *the act makes the tribal roll* as existing January 1, 1906, with eliminations and additions not material herein, *the authentic roll* of the members for the purpose of the act. * * *

The court further stated:

“The Act of 1906 makes it plain that *all whose names were on the authentic roll* were to share in the division of the tribal property. They were the ‘members’ among whom the lands were to be allotted in stated portions.”

And further stated:

“Under the Act of 1906 the death of a member entitled to an allotment does not extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name.

“Where this is done he is regarded as the allottee and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which *there is no distinctive mention of either living or deceased members.*”

Thus at least the courts in three separate cases have held, in substance, that the names appearing upon the roll, as it existed on January 1, 1906, constituted the membership of the tribe.

That Congress intended said roll of December 12, 1905, as it existed on the 1st day of January, 1906, to be the authentic, and in the language of the statute, the declared, roll of the tribe, and the persons whose names appeared on said roll to constitute the members of the tribe, subject, however,

to the elimination and addition of persons as authorized in the proviso, which are not material herein, is conclusively established by the discussion by the members of Congress, as shown by excerpts from the Congressional Record which is attached hereto as Appendix "A," and made a part of this brief.

We specifically call attention to the statement of Congressman Williams in asking Congressmen Curtis whether the Secretary of the Interior could purge the roll or change it in any manner, wherein he said, if so, it would seem possible that someone might feel aggrieved by such change and ought to have the right to assert his grievance in court and there have it determined. Congressman Curtis answered that there was no provision in the bill authorizing the courts to settle the question as to who was entitled to enrollment, **AS THE BILL PROVIDED THAT THE PRESENT ROLL WOULD BE TAKEN AS THE ROLL OF THE TRIBE**, subject to the exception that the Principal Chief of the Osages might file a complaint within a certain time alleging that certain people are thereby frauded, but the list should not include any persons whose cases had been heard or tried before; that upon a complaint being filed, it was the duty of the Secretary of the Interior to carefully investigate if fraud had been committed as to names on that particular list.

It further appears from the Congressional record, *supra*, that the bill, as introduced had been drawn by the Osages and they had almost unanimously agreed to it, had been submitted to the Secretary of the Interior and met with his approval and that of the Commissioner of Indian Af-

fairs, had been considered and approved by two subcommittees; that delegations of Osages representing all factions were present at the hearings, and that it was unanimously reported by the committee, and agreed to by the Osages.

The Congressional Record further discloses, as shown by the appendix, that Congressman Finlay inquired of Congressman Zenor whether the Secretary of the Interior was given power to purge the roll, and Congressman Zenor answered:

“No, it does not; not of his own initiative.”

He further stated that it provided the Principal Chief of the Osages might file a complaint.

Surely it was intended by Congress that the roll as it existed on January 1st, 1906, subject to the limitations provided for in the proviso, which are not applicable hereto, should constitute a roll of the members of the tribe.

PROPOSITION III.

The General Enactment Clause of section one of the Osage Allotment Act, which declared the roll, as it existed on the first day of January, 1906, to be the roll of the tribe and to constitute the legal membership thereof, was not affected by the proviso to said section, but said proviso simply made the clause:

(a) Inoperative as to those names appearing upon said roll which were contained in a list filed by the Principal Chief of the Osage Tribe of Indians with the Secretary of the Interior; and,

- (b) Not conclusive or closed as to those whose applications were pending for enrollment at the date of the adoption of said act.**

The first provision of section 1 of said act is plain and unambiguous. It, in strict and specific language, declared the roll, as it existed on the 1st day of January, 1906, to be the roll of the tribe and to constitute the legal membership thereof.

The act having declared the roll, as it existed on January 1, 1906, to be the roll of the tribe and to constitute the legal membership thereof, the question arises as to the effect of the proviso. This proviso declares in substance:

- (1) That the Principal Chief of the Osages shall file a list with the Secretary of the Interior, within three months, containing the names the tribe claims are upon the roll by fraud, and authorizes the Secretary of the Interior to make investigations thereof, and to strike such names as are contained in said list which he finds have been placed upon the roll by fraud.
- (2) That the Secretary of the Interior is to add such names to the roll whose applications were pending at the date of the approval of the act which he finds are entitled to enrollment.

In construing the force and effect of this proviso upon the subject-matter contained in the enacting clause, we direct attention to the general rule relating to provisos as stated in *United States v. Morrow*, 266 U. S. 531, 45 S. Ct. 175, where the court said:

“The general office of a proviso is to except something from the enacting clause, or to qualify and re-

strain its generality and prevent misinterpretation. *Minus v. United States*, 15 Pet. 423, 445, 10 L. ed. 791; *Georgia Banking Co. v. Smith*, 128 U. S. 174, 181, 9 S. Ct. 47, 32 L. ed. 377; *White v. United States*, 191 U. S. 545, 551, 24 S. Ct. 171, 48 L. ed. 295; *Cox v. Hart*, 260 U. S. 427, 435, 43 S. Ct. 154, 67 L. ed. 332. Its grammatical and logical scope is confined to the subject-matter of the principal clause. *United States v. White-ridge*, 197 U. S. 135, 143, 24 S. Ct. 406, 49 L. ed. 696. And although sometimes used to introduce independent legislation, the presumption is that, in accordance with its primary purpose, it refers only to the provision to which it is attached. *United States v. Falk*, 204 U. S. 143, 149, 27 S. Ct. 191, 51 L. ed. 411. Here it clearly appears that the proviso was employed in its primary sense.”

The entire context of section 1 of said statute discloses that Congress first, in definite language, provided what roll should control and that the names appearing thereon should constitute the membership of the tribe. By this declaration the names appearing upon said roll were conclusively established as members of said tribe. The proviso, however, excepted from the conclusive establishment as members of all persons whose names appeared thereon, the names of those persons appearing upon that particular list which the principal chief of the Osages filed with the Secretary of the Interior; and neither was it conclusive as against those whose applications for enrollment were pending on the date of the approval of the act; but as to every other person it was conclusive, binding and not subject to being contested in any manner.

In the concluding part of the proviso, Congress used this language:

“And the said roll *as above provided* after the revision and approval of the Secretary of the Interior, *as herein provided*, shall constitute the approved roll of the tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, * * * .”

When Congress used the language, “and the said roll as above provided,” Congress referred to the roll of January 1, 1906; and the language, “after the revision,” referred to the right to strike those names contained in the list filed by the Principal Chief of the Osages, and the language, “approval of the Secretary of the Interior,” referred to the names of those whose applications were pending.

The statute itself is clear upon its face, and when considered in the light of the history back of it, the conditions existing at the time of its enactment, and the remarks made by Congressmen at the time the statute was under discussion, it is plain that the proviso was intended to apply merely to the names of those whose names appeared upon the list filed by the Principal Chief of the Osages with the Secretary of the Interior, and to those whose applications were pending at the date of the approval of the act, which required the approval of the Secretary of the Interior.

It was manifestly intended, after declaring that a certain roll was the roll of the tribe and the names thereon were to constitute the legal membership of the tribe, that the proviso should not apply to those members whose names

were upon the roll and were not included in the list filed by the Chief of the Osages with the Secretary of the Interior.

Congress, prior to the introduction of the Osage Allotment Act, had theretofore enacted numerous statutes which had for their general purpose the allotment of lands of the various tribes of Indians to the members thereof, and, insofar as the method of determining the members of the tribe to participate in the allotments, and as to the method for establishing membership in the tribe, the acts are very distinguishable from the instant act, a different plan having been adopted in the Osage Allotment Act from that used in all previous statutes.

We refer to the manner of determining membership for allotment to the individuals of the tribes of Indians known as the Five Civilized Tribes. There had been appointed what is commonly known and referred to as the "Dawes Commission," a United States Commission with power to enroll the members of the said tribe. The Original Curtis Act, approved June 28, 1898 (30 Stat. L. 495), in fixing the method of making the roll of citizenship therein, in section 21, directed the Dawes Commission to take the roll of the Cherokee citizens of 1880, being the only roll confirmed by that and preceding Acts of Congress,

"and to enroll all persons now living whose names are found on said roll * * * ."

It authorized a roll to be made and provided that names of those now living on the 1880 Roll should be placed on the roll.

Under the same section of the statute, with regard to

the Creek freedmen, the statute confirmed the Creek freedmen roll made by J. W. Dunn in 1867, and provided:

“And said Commission is directed to enroll all persons *now living* whose names are found on said roll.”

It further provides that the Commission, in making the roll, should make a description of the persons so they could be identified. It then provides:

“The roll so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several tribes which they represent.”

In the Original Creek Agreement, being the Act approved March 1, 1901 (31 Stat. L. 861), ratified by the Creek Nation May 25, 1901, it is provided in section 28:

“All citizens who *were living* on the 1st day of April, 1899, entitled to be enrolled under section 21 of the Act of Congress approved June 28, 1898, * * * shall be placed upon the roll to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution.”

We specifically call the court's attention to the fact that it was provided that only those who were living on the 1st day of April, 1899, were entitled to be enrolled.

In the Seminole Agreement, approved June 2, 1900 (31 Stat. L. 250), it was provided that in making the roll of the

Seminole there should be placed thereon the names of all children born up to and including the 31st day of December, 1899,

“and the names of all Seminole citizens then living
* * *.”

and that the roll so made, when approved by the Secretary of the Interior, should constitute the roll of the tribe. It is further provided under section 2, that if any member should die after the 31st day of December, 1899, the lands, etc., should descend.

Under the Choctaw and Chickasaw Treaties, approved July 1, 1902 (32 Stat. L. 641) in section 27, it is provided:

“The rolls of the Choctaw and Chickasaw citizens and freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the Act of Congress approved June 28, 1898, and the Act approved May 31, 1900, except as herein otherwise provided.”

Under section 28, it is provided:

“The names of all *persons living* on the date of the final ratification of this agreement, entitled to be enrolled as provided in section 27 hereof, shall be placed upon the rolls made by said Commission.”

Under the Cherokee Treaty approved July 1, 1902 (32 Stat. L. 716), in section 25 of said act, it is provided:

“The roll of citizens of the Cherokee Nation shall be made as of September 1, 1902, and the names of all persons *then living* and entitled to enrollment on that date, shall be placed on said roll by the Commission of the Five Civilized Tribes.”

Under section 26 of said act, it is provided that the names of persons living on the 1st day of September, 1902, entitled to be enrolled shall be placed upon said roll. Section 27 provided that the roll should be made in strict compliance with the provisions of the Act of June 28, 1898; and that no person whose name appears upon the roll of the Dawes Commission as a citizen or a freedman of any other tribe should be enrolled as a citizen of the Cherokee Nation. In section 29 it is provided that the Commission of the Five Civilized Tribes may from time to time forward to the Secretary of the Interior a list of those names which are found entitled to be enrolled and when approved by the Secretary of the Interior it is to constitute a part and parcel of the final roll.

It will thus be noted that in the allotment of the lands of the Five Civilized Tribes, under the Acts of Congress and the Treaties, it was provided that a roll should be made, and who should be entitled to be enrolled thereon, and, after fixing the date on which the qualifications should be determined, it was provided that only persons living on such date should be entitled to be enrolled.

In the Osage Allotment Act there was no provision for enrollment, except as provided in the proviso. Congress simply declared that a certain roll, as that roll existed on a given date, January 1, 1906, with the exceptions not here material, should constitute the membership of the tribe. No reference whatever was made as to whether persons appearing on that roll were living or dead as of the date fixed. In every allotment act it was, of course, necessary to arbitrarily establish some method by which the membership of the tribe should be determined and fixed, but it was relatively

unimportant which method was adopted so long as it met the approval of Congress and the tribe. In the case of the Five Civilized Tribes no adequate roll of membership existed, kept up to date, when the allotment act was passed, and Congress deemed it necessary to compile such rolls. In the case of the Osages an adequate roll already existed, one completed and closed December 12, 1905, and had been completed and revised as a roll of the tribe over a long period of time. The tribe was adjusted to the fact that only persons appearing thereon might receive benefits. The Osages themselves and Congress were evidently satisfied that said roll constituted as satisfactory a roll as could be compiled, so they adopted the December 1905 Annuity Payroll as the declared roll, with some slight limitations calculated to do justice. To compile a new roll would have involved a great deal of work, created disputes, litigation, and generally disrupted the harmony of the tribe, just as the compilation of other rolls had. The adoption of the particular roll of course involved some elements of arbitrary selection, but it was impossible to accomplish the end sought without arbitrary selection; and the adoption of the existing roll without reference to whether names appearing thereon represented persons dead or alive as of January 1, 1906, was not more arbitrary, the roll being of very recent date, than would have been a provision that all persons appearing on the roll as of January 1, 1906, must be found alive, whereas the latter course would have involved additional work and controversy, and have necessitated the empowering of some person, or commission, to investigate said facts, providing methods by which said facts could be determined, of sub-

mitting the proof, and giving the interested parties an opportunity to be heard.

We call the court's attention to the fact that Congressman Curtis was the author of the Original Curtis Act and Atoka Agreement (30 Stat. L. 495), introduced said bill in Congress and was familiar with the method under which the members of the Five Civilized Tribes were enrolled. He was upon the Committee of Indian Affairs, and was, we believe, one of the authors of the Osage Allotment Act. That the Osages were familiar with the method under which the members of the Five Civilized Tribes were enrolled, and yet they saw fit to adopt a different method and to have no enrollment, but to declare a roll that already existed to constitute the roll of the tribe. Congress also knew that that roll was prepared on the 12th day of December, 1905, and knew exactly what said roll would disclose; they knew that the names appearing thereon were entitled to participate and did receive their pro rata share of the per capita payments which were made under said roll, and also knew that, whether under authority or otherwise, the names appearing thereon who were living at the date the payment was made would be entitled to receive a pro rata share of the annuity payment to be made March, 1906. That the December 12, 1905, roll would have no notations as to members who died after payment was made; that members who died after receiving payment, for illustration, a member who received his payment on December 12, 1905, and died December 13, 1905, was entitled to have his name carried forward, under the custom and practice to the March 1906 Roll, the same as a member who died January 2, 1906, who was likewise entitled to have

his name carried forth upon the same roll, and each were entitled to receive the same benefits under the March 1906 Roll.

PROPOSITION IV.

The only authority and jurisdiction conferred under section one of the Osage Allotment Act on the Secretary of the Interior to strike or purge from the declared roll members whose names appeared thereon on January 1, 1906, was the authority and jurisdiction contained in the list to be filed with him by the Principal Chief of the Osage Tribe of Indians, which he found to be upon said roll by fraud.

It may be stated as a general principle of law, and has been uniformly announced, that Congress, itself, has the exclusive power to legislate with reference to the various Indian tribes as dependent people concerning their restricted property, or property held in trust by the United States for their use and benefit.

—*Marchie Tiger v. Western Investment Company*,
211 U. S. 286, 31 S. Ct. 578.

In *Blackfeather v. United States*, 190 U. S. 368, 23 S. Ct. 772, it is said:

“The moral obligations of the Government toward the Indians, whatever they may be, are for Congress alone to recognize, and the courts can exercise such jurisdiction over the subject as Congress may confer upon them.”

It may also be stated as a matter of law that the Secretary of the Interior, as such, has only such jurisdiction in carrying into force and effect the Acts of Congress relating to Indians, as is conferred upon him by the said act itself. Con-

gress has power and authority to delegate to the Secretary those duties necessary to carry into effect the laws relating to said Indians, or may withhold such duties, if it so desires. Such is the holding of the Circuit Court of Appeals of the 8th Circuit in the case of *Jennings v. Wood*, 192 Fed. 507.

In said case the court had under consideration the act relating to the Five Civilized Tribes, wherein the Secretary was given power and authority to approve oil and gas leases made by adult members. The jurisdiction over minors was conferred upon the courts, and oil and gas leases, on the property of minors, were sold through the various County Courts. A minor 15 years of age had executed an oil and gas lease and the same was submitted to the Secretary of the Interior for approval, evidence was furnished the Secretary that the minor was of age, the Secretary approved the oil and gas lease. It was contended that under the rules and regulations prescribed by the Secretary of the Interior, the Secretary required and was furnished information as to the age of the lessor, and after considering same, found she was of age, and further found the terms of the lease were fair and reasonable and approved it, and further that the approval of a lease by the Secretary of the Interior was the act of a tribunal exercising judicial power, and that as the power of approval necessarily involved power to determine the contractual capacity of the lessor, the finding of the Secretary of the Interior that the minor was of age was conclusive. The court, in passing upon the contention, stated as follows:

“The jurisdiction of the Secretary of the Interior is only that expressed in the Acts of Congress. He was

not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indian subject to his approval in specified cases. If the Indian did not desire to lease, there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended upon the approval of that official, but he was not one of the contracting parties.”

The court further held that that act did not give him judicial powers to determine the question of whether the minor was of age.

The United States Supreme Court cited said case in the case of *Mott v. United States*, 283 U. S. 747, 51 S. Ct. 642, wherein the Secretary of the Interior attempted to approve gifts made by Jackson Barnett, and in that case, it was suggested that the approval of the Secretary of the Interior of the gifts made by an incompetent was another way of saying that the Secretary could make the gifts of his own volition, and that it must be presumed that Barnett was free from disability. The court, in reply to such suggestion, stated such contention had been disapproved by the Circuit Court of Appeals of the 8th Circuit, and cited *Wood v. Jennings, supra*.

This proviso conferred no jurisdiction upon the Principal Chief of the Osages to submit to the Secretary of the Interior a list of those whom he contended were dead upon January 1, 1906; neither did it confer upon the Secretary of the Interior jurisdiction to make such an investigation or to decide such question. If the Secretary of the Interior did attempt to so decide, his findings would be of no force and

effect, any more than his finding that the minor was of age in the case of *Jennings v. Wood*, *supra*, had force and effect. The Act of Congress conferred no such authority upon him and therefore he had none.

PROPOSITION V.

Under the Osage Allotment Act, the roll, as shown by the records of the United States Indian office, as it existed on January 1, 1906, constituted the roll approved by Congress as containing the names of all members of the tribe, subject to the right of elimination and adding such additional names as designated in the proviso.

The statute in plain and unambiguous language states that the roll as shown by the records of the United States in the office of the United States Indian Agency, at the Osage Agency, Oklahoma Territory, as it existed on the 1st day of January, 1906, is declared to be the roll of the tribe and to constitute the legal membership thereof, subject, however, to the exceptions contained in the proviso. Such is the holding in the cases of:

Taylor v. Tayrein, 51 F. (2d) 884;

United States v. La Motte, 67 F. (2d) 788;

Kenny v. Miles, 250 U. S. 59, 39 S. Ct. 417.

The roll, as shown by the records, when construed in the light of the manner in which said roll had been kept and prepared, commencing with December 31st, 1881, and the names thereon transcribed upon the succeeding rolls and by eliminating therefrom such names as the previous roll affirmatively disclosed were deceased at the time of

disbursement made under said previous roll, and adding thereto those names which the Osage Council had found were entitled to be enrolled and were approved by the Secretary of the Interior, and the fact that in disbursing funds under said roll, the receipt for the payment of said funds became a part of the roll and the witnesses who witnessed the payment, signed said roll, it is apparent that the roll not only consisted of the list of names, but the entire information appearing upon said roll which was placed thereon in accordance with the rules and regulations of the Secretary of the Interior in disbursement of funds to comply with the previous Acts of Congress.

It is apparent that Congress, when it adopted the above section, and used the language:

“That THE roll of * * *, as shown by the records of * * *, as *IT* existed on the first day of January, 1906; * * * is hereby declared to be the roll of said tribe, and to constitute the legal membership thereof;”

referred to the completed December 1905 Roll and included the record information which appeared upon said roll after the disbursement of the funds thereunder, which ended the 31st day of December, 1905, and Congress limited the records, to those records of the Indian agent appearing upon said roll, and, by said interpretation, we give force and effect to the language:

“As *IT* existed on the first day of January, 1906,” meaning the roll.

The language above named is not susceptible to the construction that Congress intended that other records, wheth-

er legally and rightfully kept or not, but not kept in connection with said roll, or as a part thereof, should be a determining factor in the determination of who was upon said roll, or to be considered in connection with determining membership in the tribe, for the December 1905 Roll, as it existed on January 1st, 1906, disclosed a list of all members of the tribe of Indians who had participated in and received benefits under the December 1905 Roll. By the disbursement under said roll, the roll would then disclose affirmatively the names appearing upon said roll which were deceased at the time of making the disbursement, and this is the roll that Congress declared to be the roll of the tribe. The language of Congress used in the proviso is to be construed as follows: "And the roll as above provided" (referring to the roll provided for in the enacting clause) "after the revision" (meaning the revision designated in the proviso, which authorized the Secretary to strike therefrom such names as were contained in the list filed by the Chief of the Osages with him, which the Secretary found were on said roll by fraud) "and the approval" (meaning the approval of those persons whose applications to be enrolled were pending at the time of the approval of the act, which the Secretary found were entitled to be enrolled), "as herein provided" (meaning as provided in the proviso, which was limited to the approval of the names to be stricken and the names to be added), "shall constitute the approved roll of the tribe." Therefore, the approved roll of the tribe constituted three separate classes of names:

- (a) Those whose names appeared upon the roll on January 1, 1906.

- (b) Those names referred to in (a) subject to the right of the Secretary of the Interior to strike said names contained in the list filed by the chief of the Osages with him.
- (c) The names of those who had applications pending upon the approval of the act, which the Secretary found were entitled to be enrolled.

PROPOSITION VI.

The Osage Allotment Act conferred no jurisdiction and gave no power to the Secretary of the Interior to determine or to make an investigation for the purpose of determining whether the Indians whose names appeared upon the December 12, 1905, Roll, as it existed on January 1, 1906, were living or dead.

If the act conferred no jurisdiction upon the Secretary of the Interior to determine that fact, then any purported investigation would be without power and authority conferred upon him, and would be of no force and effect.

The December 12, 1905, Roll, as it existed on January 1, 1906, did upon its face, contain notations which disclosed the Indians who had died prior to the payment under the December 12, 1905, Roll. As to those who come within that class, and as to the force and effect of the Act of Congress upon those names which the roll affirmatively discloses were deceased when payment was made under said roll, the same is not relevant. Whether the heirs of those whose names appeared upon the December 12, 1905, Roll, and opposite whose names there appeared the notation that said Indian had died prior to payment, are entitled to participate in the

benefits of the act, it is unnecessary to decide because their rights are not involved herein, unless the appellant's contention is sustained that the roll on January 1, 1906, does disclose on its face that Timothy Hamilton was deceased on said date. I do not believe the photostatic copy attached in the record so discloses.

We allege in our application before the Secretary of the Interior, and the records affirmatively disclose, that Bennie Strike Axe, *et al.*, were living on the date of the payment and distribution of the funds under the said December 12, 1905, Roll, and the roll does not affirmatively disclose they were deceased on January 1, 1906. We do allege, although believing it immaterial and incompetent, it was the universal custom and practice, that a person being alive upon said date, under the tribal laws and customs and under the custom and practice of the Secretary of the Interior in paying said funds, was entitled to have his name transcribed upon the March 1906 Roll, and, if he died between the 12th day of December and the time of the preparation of the March 1906 Roll, his heirs were entitled to collect and receive his per capita payment. Neither his right, as a member of the tribe, nor that of his heirs, were extinguished immediately upon his death, but those rights continued until his heirs had received a per capita payment, after his death, under the tribal custom and continued on the roll during such time, to receive the pro rata portion of the funds to be distributed to members of the tribe.

PROPOSITION VII.

The Osage Allotment Act should be construed in accordance with the language used in said act.

In construing the Osage Allotment Act, the same rule of construction is applicable as in construing any other Act of Congress, to-wit, where the language used in the statute is plain and unambiguous, there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.

It has been the settled law that in determining the force and effect of the statutes, the construction to be placed thereon, the meaning must first be sought in the language used, and it is the duty of the courts to enforce and construe the law as written, provided it is within the constitutional authority of the legislature which passed it. *United States v. Standard Brewery Company*, 251 U. S. 210, 40 S. Ct. 139. It is also well settled that where the language is clear and its meaning plain, the courts are bound by the words used, and are not at liberty to conjure up conditions to raise doubt as to its construction; where no ambiguity exists, there is no reason for construction. *United States v. Missouri Pacific Railway Co.*, 278 U. S. 269, 49 S. Ct. 133.

It was for Congress to determine whether it would declare a roll already in existence to be the roll of the tribe or would provide some other method for enrolling the members thereof, and it was for Congress to determine who should constitute the members of the tribe. It was also the duty of Congress to determine what authority should be

conferred upon the Secretary of the Interior in carrying out the provisions of the act.

The Osage Allotment Act in plain language declares the roll of the Osages, as the roll existed on the 1st day of January, 1906, to be the declared roll of the tribe, subject to certain limitations set forth in the proviso which are not material herein. There is no language in the act, or in the proviso, that even suggests that the Secretary of the Interior was to enroll those members whose names are on the roll, as it existed on January 1, 1906; but the language of the act is plain, and Congress in direct and positive language stated that the roll which existed on January 1, 1906, was declared the roll of the tribe. Having declared it to be the roll of the tribe, there is no language to indicate that the Secretary of the Interior had any power, authority, or jurisdiction over the roll except such power and jurisdiction as was granted in the proviso. The roll, then, as it existed upon January 1, 1906, constituted the authentic roll of the tribe. *Kenny v. Miles*, 250 U. S. 58, 39 S. Ct. 417; *United States v. La Motte*, 67 F. (2d) 788. Those names appearing upon the roll as it existed on January 1, 1906, were finally and conclusively established as legal members of said tribe, subject, however, to the addition and elimination of names as authorized by the proviso, which has no application to the membership involved herein.

The proviso is not an independent enactment, but occupies the same office usually occupied by a proviso, only referring to and limiting what precedes it. Congress, in the proviso, refers to the roll by directing the Principal

Chief of the Osages, within three months, to file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud. The word "roll" refers to the roll used in the enacting part of the section, which declares the roll, as it existed on January 1, 1906, to be the roll of the tribe. There is no ambiguity in the power conferred upon the Principal Chief of the Osages to attack or assail the names appearing upon said roll; his power and authority was clearly limited by the proviso to filing a list of names which he charged to be upon the roll by fraud. There is no ambiguity in the power and authority conferred upon the Secretary of the Interior. There was not conferred upon him the power and authority to initiate proceedings to contest names appearing upon said roll, but he was limited to passing upon the names contained in the list filed with him by the Principal Chief of the Osages. As to all other names, he was without authority, jurisdiction or power to strike or otherwise interfere. In adding names, the Secretary's power and authority was limited to passing upon those whose applications were pending at the date of the approval of the act; if he found one whose application was pending entitled to be enrolled, he should add the name. There probably were Indians possessing the other qualifications for membership in the tribe, but whose names did not appear upon the roll, and whose applications were not pending on the date of the approval of the act; if so, the Secretary of the Interior was wholly without authority, jurisdiction or power to place them upon the roll.

Following the settled rules of law in construing the proviso, we find the act falls far short of conferring upon

the Secretary of the Interior any power or authority to determine, adjudicate, or investigate whether a person whose name appeared upon the roll on January 1, 1906, was living or dead. Having been granted no authority, and no language in the act is subject to a construction that such authority was granted, it follows that the Secretary of the Interior had no such power or authority, and any assumption thereof was beyond his jurisdiction, and any determination of the question he might have made is absolutely void.

Had this act been susceptible of the interpretation that the Secretary might strike those names from the roll which represented persons whom he determined were dead prior to January 1, 1906, in the instant cases, his action in striking the names would have been void, because:

“The Secretary of the Interior must give notice and an opportunity to be heard to those whose rights would be affected by the correction of the roll.”

—*Tiger v. Twin State Oil Co.*, 48 F. (2d) 509;

Memohah v. Schaffer Oil Co., 30 F. (2d) 665;

United States v. Wildcat, 244 U. S. 111, 37 S. Ct. 561;

Garfield, Secretary, v. Goldsby, 221 U. S. 249, 29 S. Ct. 62;

Brown v. Hitchcock, 173 U. S. 473, 19 S. Ct. 485.

There is no apt language in the act to support the theory that the Secretary of the Interior was granted power and authority to make such investigation and determine such fact, any determination he might make would be void, and in conflict with the rule announced in *Jennings v. Wood*,

192 Fed. 507, and *Mott v. United States*, 283 U. S. 747, 51 S. Ct. 642.

Whether the act omitted from the authentic roll those names appearing upon the roll as it existed on January 1, 1906, but opposite whose names there appearing at that time a notation of the persons's death, is a question not involved in the decision of either of the present applications. In all of these applications it appears that there was no notation on the roll, of the death of any of these applicants as the roll, or records, existed on the 1st day of January, 1906.

We have read the letter written by the Honorable Frank Campbell, Assistant Attorney General, dated August 10, 1906, and directed to the Secretary of the Interior. This letter might be applicable to those names which appeared upon the roll on January 1, 1906, opposite which appeared the notation of the member's death; but insofar as applied to the instant situation and construed to hold that the Secretary of the Interior, under the Act of Congress, was clothed with authority to make an investigation, without notice and without a hearing, and determine said fact, the proposition is without authority of law to support it.

The rule is well settled that a definitely settled administrative construction is entitled to the highest respect and such construction cannot be disturbed except for cogent reasons. *Logan v. Davis*, 233 U. S. 613, 34 S. Ct. 685. But the court is not bound by a construction so established. *Chicago M. & St. P. Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 40 S. Ct. 504; *United States v. M. P. Ry. Co.*, 278 U. S. 269, 49 S. Ct. 133; *United States v. Dickson*, 15 Pet.

141, 10 L. ed. 689. Nor does said rule apply where the construction is not doubtful.

PROPOSITION VIII.

The Secretary of the Interior, with regard to those names which appeared upon the declared roll of the tribe and did not come within the provisions of the proviso, had no discretion in the division of the tribal funds and mineral interests, except the ministerial duty of crediting and disbursing the funds provided for in said act and the amendments thereto in accordance with said act and amendments.

Under section 1 of the Osage Allotment Act it is provided:

“The tribal lands and tribal funds of the said tribe shall be equally divided among the members of said tribe as herein provided.”

I do not propose to discuss the duties of the Secretary of the Interior as to the land, but insofar as the tribal funds and tribal mineral interests are concerned, they are controlled by sections 4 and 6 of said act, and the various amendments thereto. The ministerial duty of the Secretary of the Interior, thereunder, was to prorate the funds and disburse the same in accordance therewith. The general rule may be stated as follows:

“Every statute to some extent requires construction by the public officer whose duties are defined therein. Such officer must therefore, in a certain sense, construe it, in order to form a judgment from its language what duties he is directed from the statute to perform. But this does not necessarily in all cases make the duty of the officer other than a ministerial one. If the law di-

rects him to perform an act in regard to which no discretion is committed to him, then the act is ministerial, although depending upon a statute which requires in some degree, a construction of its language by the officer.”

—*Roberts v. United States*, 176 U. S. 221, 20 S. Ct. 376;

Work v. United States, 261 U. S. 352, 43 S. Ct. 389;

Work v. United States, 262 U. S. 200, 43 S. Ct. 580.

The Circuit Court of Appeals of the Eighth Circuit in the case of *Chase v. United States*, 261 Fed. 863, stated as follows:

“A statute which ‘authorizes’ a public officer to do a certain thing imposes upon him a positive and absolute duty to do such act, which may be enforced by those for whose benefit it is to be done, in the absence of words giving him a discretion.”

The Secretary of the Interior, under the power and discretion devolved upon him, as to those Indians whose names appeared upon the roll and were contained in the list filed by the Principal Chief of the Osages, and as to those Indians whose applications were pending at the time of the approval of the act, had discretionary power and authority and his actions therein could not be controlled by mandamus. *Wilbur v. United States*, 281 U. S. 206, 50 S. Ct. 320. But, the discretion granted with regard to those two classes of Indians did not extend to, nor has it any application to, the class whose names appeared upon the roll and did not fall within the exception, in the proviso, that authorized the Secretary of the Interior, to strike those names

appearing on the list filed by the Principal Chief of the Osages, which he found was upon the roll by fraud, nor to those whose applications were pending at the date of the approval of the act.

I, therefore, submit:

1. That the enacting clause of section 1 of the Osage Allotment Act declared the December 12, 1905, roll, it being the last official roll prepared by the Osage Agency prior to January 1, 1906, to be the authentic roll, and to govern the distribution of the lands, moneys and mineral interests provided for in said act.

2. That the proviso contained in section 1 of said act has no application to those whose names appeared upon said roll, except as limited to those names contained in a list filed with the Secretary of the Interior by the Principal Chief of the Osages; and as to those names on the declared roll, not appearing on said list, said proviso has no application.

3. That the name of those appearing upon the roll declared by Congress to be the roll of the tribe, they and their heirs became vested of a right to participate in the lands, moneys, and mineral interests provided for in the act.

4. That the Osage Allotment Act, having declared the names upon the roll specified to constitute the legal membership of the tribe, and having authorized the Secretary of the Interior to make disbursements of the funds to those members, there was imposed upon the Secretary of the Interior a positive and absolute duty to do such act, which duty may be enforced by proceedings at law.

5. That under the facts set forth above, the heirs of those appearing on the declared roll are entitled, as a matter of law, to have a writ of mandamus issue to the Honorable Secretary to credit them their pro rata share of all funds coming into his hands as Osage funds to which they are entitled, and disburse to them such funds as they are entitled to have, under the said act and the amendments thereto.

Answer to Appellants' Brief.

The appellants, in support of their contention that the judgment of the trial court should be reversed, present their argument under separate propositions, the first of which is stated as follows:

“There is no judicial jurisdiction to confer rights of tribal membership upon Timothy Hamilton because he is not named upon the final roll of the Osage Tribe approved by the Secretary of the Interior.”

It being conceded that the name of Timothy Hamilton appears upon said roll of the tribe, as shown by the records of the Osage Indian Agent at the Osage Agency, as it existed on January 1, 1906, and not contested, as authorized by the proviso to section 1 of the act, it is immaterial whether his name appears upon the roll approved by the Secretary so long as his name was on the roll declared by Congress to be the roll of the tribe, and to constitute the membership of the tribe.

After the Osage Allotment Act had been passed and approved, and the Principal Chief of the Osage Tribe of In-

dians filed no list with the Secretary of the Interior, contending that any of the names appearing thereon had been placed upon said roll by fraud, and the time having transpired for the filing of said list, the acting Commissioner of Indian Affairs directed a letter to the Osage Indian Agent (R. 16) directing the Osage Agent to prepare, in triplicate, as complete a roll as possible of the Osage Tribe of Indians, and to forward the same to his office for the approval of the Secretary of the Interior. His directions read as follows:

“The roll should consist of:

- (1) the names on the Osage tribal roll as it existed in your office on the first day of January, 1906; and
- (2) the names of all persons, including adults and children, subsequently added thereto by directions of this office with the authority of the Secretary of the Interior in accordance with the provisions of section 1 of the act named.

“The column for remarks in the roll should show the date and file number of the authority for each name added to the roll ‘as it existed on the first day of January, nineteen hundred and six.’

“You should properly certify to the correctness of the roll.

Very respectfully,

C. F. Larrabee,

Acting Commissioner.”

It will be noted the directions of the Commissioner of Indian Affairs were specific in directing the Osage Indian Agent to certify to names on the tribal roll, as it existed on the first day of January, 1906; there were no directions

for the agent to eliminate therefrom the names on the roll, which the roll affirmatively disclosed were deceased, nor for the agent to make an investigation or to determine which of said members were deceased on January 1, 1906.

The Osage Indian Agent, however, relying upon a letter from Mr. Frank Campbell, Assistant Attorney General, prepared a roll, and, without any authority of law, or any applicable language in the statute that would confer such authority, arbitrarily omitted from said certified copy the names of those appearing upon said roll which the roll affirmatively disclosed were deceased on January 1, 1906, and in addition thereto, he not only eliminated those names, but he eliminated the names of those whom he thought, or those he had determined or concluded from information other than the roll itself, had died between the closing of the December 12, 1905, roll, and January 1, 1906. This without any hearing or notice, and from information or records other than the roll itself, nor did he limit his investigation to the records or roll as it existed in his office on January 1st, but he used other records prepared after January 1, 1906. So it must be admitted and conceded that the Osage Indian Agent did not correctly certify the tribal roll as it existed in his office on the first day of January, 1906, but he erroneously certified to a roll which did not correctly reflect the roll as it existed on January 1, 1906, and it is this roll, so certified, which the government contends is the final and conclusive roll.

Our contention has heretofore been stated as follows:

(a) That the declared roll of the tribe, as it existed on

January 1, 1906, was the roll declared by Congress to be the roll, and the names appearing thereon were declared to be the members of said tribe, and the Secretary of the Interior had no authority, power or jurisdiction over said names or over said members.

- (b) The only power and authority conferred upon the Secretary of the Interior was that contained in the proviso, to-wit: To strike such names contained in the list filed with him by the Principal Chief of the Osages, within a certain time, which the tribe claimed to be upon the roll by fraud, and to add the names of those whose applications were pending on the date of the approval of the act, which he found to be entitled to enrollment.

It certainly cannot be seriously contended that one can be deprived of a right vested in said person by an Act of Congress, by reason of an Indian Agent incorrectly certifying a roll, and erroneously omitting the party's name from said certified roll.

We have heretofore discussed the distinction between the roll of the Osage Tribe of Indians and the method of enrolling and allotting the members of the Five Civilized Tribes. This distinction has been summarized as follows:

As applicable to the Osage Tribe of Indians, Congress declared a roll to be the roll of the tribe, and, as to the names appearing upon said roll, the Secretary of the Interior had no discretion, judgment, authority, or jurisdiction over the same, except as limited in the proviso to section 1.

As applicable to the Five Civilized Tribes, Congress

provided for the preparing and compiling of a roll with discretion in the Dawes Commission and the Secretary of the Interior to determine facts and to adjudicate who was entitled to be enrolled.

It will thus be noted that the methods and plans adopted were not similar. As to the Five Civilized Tribes, the Secretary of the Interior did have discretion, but as applicable to the Osages, he had no discretion nor jurisdiction, except in relation to the names coming within the terms of the proviso, which are not applicable herein.

In the case of the *United States v. Atkins*, 260 U. S. 220, the court held that when the Dawes Commission had adjudicated a party was entitled to enrollment, this constituted a judicial determination that said party was living and could not be attacked in a subsequent proceeding, so when Congress, in plain language, declared that a certain roll was declared to be the roll of the tribe, and constituted the legal membership thereof, the doors were closed and the membership of those whose names appeared upon said roll was established and not open to attack in any manner by the tribe, Secretary of the Interior, or anyone else, except as provided in the proviso, which has no application to facts under consideration.

The second proposition of appellants reads as follows:

“The writ of mandamus issued in this case unlawfully controls and reverses decisions of the appellant and of a former Secretary of the Interior in a matter requiring the exercise of judgment and discretion in the determination of questions of law and of fact.”

In support of the above proposition, counsel states as follows:

“Administrative refusal to enroll Timothy Hamilton has been predicated upon the following findings of fact and interpretations of the Osage Allotment Act.”

The fallacy of the above statement is founded on a misconstruction of the Osage Allotment Act. If the substantive part of section 1 of said act which declared the roll, as it existed on the 1st day of January, 1906, to be the declared roll of the tribe, Timothy Hamilton was already enrolled upon the roll declared by Congress to be the roll of the tribe and his membership was established. The administrative authorities had nothing to do with his enrollment.

This is clearly demonstrated by the proviso, in referring to the names contained in the list to be filed by the Chief of the Osage Tribe of Indians with the Secretary of the Interior, wherein it is said:

“Their names shall not be stricken from the roll for fraud, except upon newly discovered evidence,”

and again said:

“and the Secretary of the Interior is hereby authorized to strike from said roll names of persons or their descendants which he finds were placed thereon by or through fraud.”

Certainly it cannot be contended that the Secretary of the Interior was to strike names from a roll which did not exist. The language used demonstrates conclusively, that the proviso was referring to the roll, as it existed on the first day of January, 1906, and the only authority conferred

upon the Secretary was the authority to strike from that roll, the names contained in a list filed by the Chief of the Osages which it was contended were upon said roll by fraud.

Under the above heading, counsel argue the following proposition:

“A. Questions of fact concluded by prior administrative determination and admitted by demurrer to answer.”

As to whether Timothy Hamilton died prior to January 1, 1906, I am not advised, and as to whether counsel for Timothy Hamilton submitted themselves to the jurisdiction of the Secretary of the Interior for the purpose of having the Secretary adjudicate that fact, I am not advised. However, it is my contention there is no applicable language in the Osage Allotment Act which authorizes the Secretary of the Interior to adjudicate said fact—there is no language in the act which makes a decisive question—there is no language in the act, subject to any reasonable construction, that any jurisdiction was ever conferred upon the Secretary of the Interior to adjudicate and determine whether a member of the tribe on January 1, 1906, was living or dead. Congress provided that the roll as shown by the records of the United States in the office of the Osage Indian Agent, at the Osage Agency, as it existed on the first day of January, 1906, was the declared roll of the tribe. As to those Indians which the roll affirmatively disclosed were deceased prior to January 1, 1906, there might be a question as to their rights. However, the records in the case at bar, while different from those I represent, does not affirmatively dis-

close that Timothy Hamilton was deceased on that date. It does appear that there is a writing on the roll attached to the effect that either Timothy Hamilton or the child enrolled above the name of Amos Hamilton had died November 19, 1905, but that writing has been scratched out. If it is contended that the roll on January 1, 1906, does affirmatively disclose that Timothy Hamilton had died prior to January 1, 1906, then a question arises in which I am not interested except, the record itself is conclusive as to said facts and language may not be used in the opinion affecting those members which the roll does not affirmatively disclose were deceased prior to January 1, 1906.

Counsel for your Honorable Secretary, under subdivision "B", states as follows:

"B. Questions of law concluded by prior administrative determination."

Counsel, under this heading, then state:

"The basic issue of law involved in the claim that Timothy Hamilton is entitled to enrollment under the Act of June 28, 1906, is the interpretation of the language with which the statute begins."

I cannot agree that is the basic issue of law involved in the case. It is not a question of whether Timothy Hamilton is entitled to be enrolled, but it is a question of whether he is enrolled on the roll declared by Congress to be the roll of the tribe. It being my contention, under section 1 of the act, quoted on page 19 of counsel's brief, Congress declared those whose names appeared on said roll to be the members of the tribe. It must be conceded, if Congress declared the

roll, as it existed on January 1, 1906, to be the declared roll of the tribe and to constitute the membership thereof, those names appearing thereon became vested with the right, upon the approval of the act, to participate in the benefits of said tribe.

Under this subdivision counsel cite the case of *Wilbur v. United States, ex rel. Kadie*, 281 U. S. 206, 50 S. Ct. 320. This case involved the right of a Chippewa Indian to participate in per capita payments. The court in that case stated the manner of preparing the rolls for making said per capita payments, and the opinion recites the method the Indian Agent prepared said rolls is almost identical with the custom followed by the Indian Agent in preparing the various rolls of the Osages, except as disclosed by the opinion wherein the court stated as follows:

“Taking the Commissioner’s census as a primary guide, eliminating the names of Indians dying after those rolls were made, making supplemental rolls of Indians erroneously missed, etc. * * *”

However, the practice applicable to the Osages was to take the previous roll as a guide, eliminating only the names appearing upon said previous roll that the roll affirmatively disclosed had died before said roll was made and not after. By the method applicable to the Osages, the rights of a member did not automatically terminate upon his death, but his heirs were entitled to collect and receive one payment after his death.

Counsel for the Honorable Secretary, on page 26 of their brief, attempt to and do, as a matter of fact, distinguish the facts in the *Hamilton* case from the facts in the

cases represented by me, by reciting the proceedings of the Osage Council on December 4, 1905, and the record of the Council on December 4, 1905, discloses that Timothy Hamilton died prior to being placed upon said roll and the further fact that the December 1905 Roll discloses that Timothy Hamilton had died in November, 1905. If the roll disclosed that Timothy Hamilton was deceased prior to the payment made under said roll, a different question may arise in the *Hamilton* case than in those cases represented by me. Under that class of cases, the sole question for consideration would be as follows:

Where the December 1905 Roll affirmatively discloses the member was deceased on January 1, 1906, are the heirs of said member precluded from receiving the benefits under said act?

The defense in the *Hamilton* case is distinguishable from the defenses in the cases represented by me, although I do not believe the same is material or competent evidence, the March 1906 Roll discloses that Timothy Hamilton's name was transcribed thereon as a member of the tribe, but the annuity payment was withheld for the reason that he died prior to the preparation of the December 1905 Roll, while in those cases represented by me, the March 1906 Roll discloses their names were transcribed thereon as members of the tribe, and the annuity payment made to their heirs.

The Osage Allotment Act should be construed as written, and it is not within the province of the Secretary of the Interior or the courts to conjure upon the condition of determining whether a member was living or dead to raise a doubt as to its construction. *United States v. Missouri Paci-*

fic Railway Co., 227 U. S. 269. If such question was to arise, it was for Congress to say whether there should be any distinction between the living and deceased members. The names appearing upon the December 1905 Roll constituted the legal membership of the tribe, and the Secretary of the Interior was without any power, authority or jurisdiction over said names, except to pro rate to them their proper share and portion of the funds and mineral rights accruing under said act.

The third proposition of appellants is stated as follows:

“The mischievous consequences to be anticipated from reopening the Osage rolls after the lapse of 30 years should preclude the issuance of the prerogative writ of mandamus in the circumstances in this case.”

There can be no mischievous consequences in construing the statute as written. It was the duty of the Secretary of the Interior to protect the individual Indians, as members of the tribe, in their rights, and it was his duty to see, under the Osage Allotment Act, that each received his proportionate part of the benefits provided for in said act. There is no attempt to open the rolls or to enroll the members upon the tribal roll. Congress, itself, declared the roll and declared it closed. This proceeding is to require the Secretary to make distribution to those whose names appear upon the roll, and whom Congress declared to be members of the tribe. The only mischief that can be anticipated is that those whom Congress declared to be members of the tribe and have heretofore been deprived of the benefits conferred upon them by Congress, will continue to be deprived of their rightful share of the tribal property.

We submit to this court that, under the record and under the facts as they exist, the members of the tribe who have been deprived of their rightful share in the property of the tribe may be classified in three separate groups:

- (1) Those names which appear upon the December 1905 Roll, where the roll does not affirmatively disclose that they were deceased, but the Osage Indian Agent arbitrarily determined and decided that they were dead upon the first day of January, 1906, and eliminated their names from the roll he certified to the Secretary of the Interior.

As to those who come within the above class, we submit that Congress closed the doors for investigation or inquiry, and, having declared the roll to be the roll of the tribe, and to constitute the legal membership thereof, their membership was conclusively established and not subject to attack.

- (2) Those whose names appeared upon the December 1905 Roll and on January 1, 1906, the roll affirmatively disclosed that they were deceased and were eliminated by the Osage Indian Agent from the roll he certified to the Secretary of the Interior.

As to this latter class, there is involved the direct question of law, and not of fact, whether Congress made any distinction between those living and those dead, whose names appeared upon the roll on January 1, 1906. If the rule is followed as announced in the case of *Kenny v. Miles*, *supra*, it is evident that Congress made no distinction between those members living and those dead, so long as their names appeared upon the declared roll.

- (3) It may be that the case of Timothy Hamilton stands alone, as the counsel for appellant and appellee do not agree whether the roll affirmatively disclosed he was dead or alive on the first day of January, 1906, and said case might be distinguishable from other cases by reason of said fact.

However, I submit the December 1905 Roll, as it existed on the first day of January, 1906, is the declared roll, and those whose names appeared thereon, constitute the members of the tribe, as declared by Congress, subject to additions and eliminations, not material in this proceeding, and upon approval of said act, the rights of those whose names appear on the roll, to participate in the distribution of the tribal property became vested.

Respectfully submitted,

NEAL E. McNEILL,

Amicus Curiae.

APPENDIX "A."

Part 8
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98 7413:

"Mr. Curtis: Mr. Speaker, as the bill was submitted to Congress by the tribe itself, after it had been voted on by the members of the tribe, I am satisfied there will be no objection on this side or by the members of the committee, at least, to having the bill resubmitted to the tribe.

"Mr. Williams: Let me ask the gentlemen a question in connection with the bill. Does this bill cut off the right of these people to enter the courts in order to determine their tribal relations?

"Mr. Curtis: There is no question about their tribal relations. They are continued for twenty-five years, and then they may be further extended by Congress if it sees fit.

"Mr. Williams: The gentleman misunderstands me; but about which Indians shall be on the tribal roll? As I caught the reading, it gives authority in that respect to the Secretary of the Interior.

"Mr. Curtis: To the Secretary of the Interior.

"Mr. Williams: And he can purge the roll and do it when he pleases?

"Mr. Curtis: That is to be done——

"Mr. Williams: One moment, and then the gentleman can answer it all at once. Now, if he can purge the roll and change it in any manner, then it would be possible that some Indian might be aggrieved or might think himself aggrieved, and if so, of course, he ought to have the right to assert his grievance in court and ought to have it determined.

“Mr. Curtis: There is no provision in this bill authorizing appeal to the courts to settle the question as to whom is entitled to enrollment. The bill does provide that the present roll will be taken as the roll of the tribe, except that the chief may file a complaint within a certain time, alleging that certain people are there by fraud. That list shall not include any person whose case has been heard or tried heretofore. That complaint being filed, it is the duty of the Secretary of the Interior to carefully investigate and determine if fraud has been committed as to that particular list. I might say to the gentleman that there are but very few contested cases in the Osage Reservation.”

* * * * *

“Mr. Williams: One other question. Has this bill the unanimous report of the Committee on Indian Affairs?”

“Mr. Curtis: It has the unanimous report of the Committee on Indian Affairs and has been considered by two subcommittees. It was drawn by the Osages and submitted to a vote of the tribe. They almost unanimously agreed to it. They sent delegations here representing both factions. They appeared before the committee and asked for its passage. The bill was submitted to the Secretary of the Interior and met the approval of the Commissioner of Indian Affairs and the Secretary, and was then considered as I said before, by two subcommittees of the Committee on Indian Affairs and unanimously reported.”

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“Mr. Finley: Are there not some white settlers in this area?”

“Mr. Zenor: There are some who are admitted to membership of the tribe by virtue of ordinances passed

by the Osage Council, and such other procedure as is recognized by their tribal laws, quite a large number.

“Mr. Finley: Will not this bill give to the Secretary of the Interior the authority to purge the rolls of such classes, if he sees fit?

“Mr. Zenor: No; it does not; not of his own initiative. It provides that the chief of the tribe shall, within three months after the passage of this act, make out a list of such persons as the tribe deems to be on the rolls fraudulently, and that list is submitted to the Secretary of the Interior, and he shall make an investigation, and if he finds that persons now upon the rolls have procured their enrollment fraudulently he may purge the rolls of those names. The provisions of the bill, however, place the *onus* of proof upon the tribe to show that the names of such persons included in such list were fraudulently placed thereon.

“Mr. Curtis: That was a provision the Indians themselves asked for.

“Mr. Zenor: Yes; that provision is included in the bill; and I believe no serious objection is made to it, but some of the full bloods wanted a different and more drastic provision in this matter.

“Mr. Finley: All persons who have been added to the tribe since 1901?

“Mr. Curtis: Since the former action—since it was acted upon.

“Mr. Zenor: This provision authorizes the chief to submit a list including none back of that date. He is precluded from going back of that. There is a complaint however, among the full bloods that some of these parties procured an enrollment prior to that date, but this bill forbids their going back.

“Mr. Curtis: Those cases were acted upon by the Secretary of the Interior fourteen years ago.

“Mr. Zenor. I think that is correct, but there was a controversy going on, and there were two reports made by parties sent down there to make an examination, and they differed about it.

“Mr. Finley: Does the gentleman think the taking away the right to report to the courts to settle the membership of this tribe is good policy?

“Mr. Zenor: In answer to the gentleman, in reference to that matter, it seems to have been universally conceded that they wanted the matter settled in this summary way, without appeal to the courts.

“Mr. Finley: What is the status of this tribe of Indians in regard to the matter of citizenship? Have they the right to vote?

“Mr. McGuire: They are still an unorganized territory.”